

February 3, 2011

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

REPORT AND DECISION

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

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

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

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

Respondent: Department of Development and Environmental Services (DDES)
represented by **Kimberly Claussen**
900 Oakesdale Avenue SW
Renton, Washington 98055
Telephone: (206) 296-7167
Facsimile: (206) 296-6728
Email: kimberly.claussen@kingcounty.gov

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

EXAMINER PROCEEDINGS:

Hearing opened: January 10, 2011
Hearing administratively continued: January 11, 2011
Hearing closed: January 26, 2011

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

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

FINDINGS OF FACT:

1. On August 27, 2009, T-Mobile submitted a conditional use permit (CUP) application to the King County Department of Development and Environmental Services (DDES) to locate a cellular transmission facility within the public street right-of-way adjacent to 16921 SE 144th Street, Renton. The application seeks to replace a 33-foot high existing Puget Sound Energy (PSE) utility pole with a larger wooden pole at a height of 100 feet. As originally proposed, the new pole would continue to provide PSE utility service, but also would be mounted at the top with two sets of three-direction T-Mobile antennas. The proposed facility requires a CUP pursuant to KCC Chapter 21A.26 both as a transmission support structure that will exceed 60 feet in height within an R-4 zone and as a replacement structure that will exceed the height of the existing pole by more than 40 feet.
2. On March 25, 2010, DDES issued administratively both a CUP approving of the proposed minor telecommunication facility and a mitigated determination of non-significance (MDNS) placing two requirements on its construction. The MDNS requires the facility to have a minimum of eight hours of backup power supply, the painting of the antennas to blend into the pole environment and an equipment cabinet surrounded by a six-foot high fence and landscaping. Since the proposal as currently revised anticipates that the equipment cabinet will be buried within an underground vault, T-Mobile has appealed the portion of the MDNS requiring the fence and the landscaping. DDES has stipulated that the MDNS should be revised as requested by T-Mobile.
3. Due to a notice error, the MDNS was reissued by DDES on July 29, 2010, and both the MDNS and the CUP were appealed by neighborhood resident Barbara Little. The pre-hearing history for this proceeding has been extensive and varied, with two items perhaps deserving further mention. A pre-hearing order was issued on September 30, 2010, which undertook to define the appeal issues and set deadlines governing the filing of a summary judgment motion by T-Mobile. The contested appeal issues were defined for the CUP as involving design compatibility issues plus questions relating to traffic and noise impacts from construction activity or a power outage to the facility. Appellant Little's SEPA appeal issue was summarized as whether the visual, traffic and noise effects of the T-Mobile proposal would individually or collectively result in an unmitigated significant adverse environmental impact.
4. T-Mobile was authorized to file a motion for partial summary judgment challenging whether consideration of the potential for greater suitability of alternative sites in the immediate vicinity is a factor required for the analysis of issues under KCC Chapter 21A.26. A summary judgment order was issued by the Hearing Examiner's Office on November 15, 2010, which narrowed but

did not eliminate the alternative sites analysis issue. The order concluded that the reference within KCC 21A.26.330 to “alternative site placement” only related to alternative sites within the proposed parcel itself, not to other neighborhood locations. But the Examiner ruled that an ambiguity exists within KCC 21A.26.400.A that had not been briefed by the parties, and such ambiguity needed to be resolved before ruling that an alternative sites analysis requirement was clearly inapplicable to this proposal. Accordingly, issue 2.D within the pre-hearing order was revised and discovery of alternative site feasibility data was authorized.

5. As the review process progressed, T-Mobile made a number of revisions to its proposal that reduce its visual impact. As noted, the equipment cabinet has been relocated to an underground vault within the right-of-way. The double set of antennas originally proposed has been reduced by one-half so that T-Mobile is now applying to install a single array of three antennas which will accommodate 3G service only. This revision also has allowed the number of exterior conduits to be lowered from six to four as well as a six-inch reduction of the tapered pole width. As described by the Applicant, the proposed pole will be 22 inches wide at the base with another 24 inches of conduit extension, for a total maximum profile width of 46 inches. The pole width at the top will be reduced to 11 inches plus conduits or antennas, as applicable.
6. A public hearing on the conjoined CUP and SEPA appeals was opened on January 10, 2011 and closed for the most purposes on January 11, 2011. The record was left open for the parties to submit post-hearing briefs and reply declarations evaluating the techniques employed to simulate the visual impacts of the proposed new facility. The January 12, 2011 notice of continuance authorized declarations “discussing the visual impacts of the proposed cell tower facility as depicted in the photographic mock-ups previously offered by the parties,” including “whether the various visual representations of the proposed facility are accurate and reliable as to detail, size and scale, and whether they are consistent with one another.”
7. Briefs were received from all parties. T-Mobile in addition submitted a declaration from its consulting engineer BJ Thomas regarding photo simulations. Appellant Barbara Little submitted three declarations: one executed by both her and her assistant Peter Rockwell discussing the simulation issues, plus two further declarations by Mr. Rockwell. One of Mr. Rockwell’s additional declarations offers further information on the open space status of the Renton Fish and Game Club property, and the second is a last-minute comment on Mr. Thomas’s declaration. T-Mobile filed an email objection to the Little and Rockwell joint declaration as being formally deficient and to the two further Rockwell declarations as constituting unauthorized rebuttal evidence.

T-Mobile’s objection will be granted with respect to the two unauthorized Rockwell rebuttal declarations and denied with respect to the jointly-executed declaration dealing with photo simulations. It is clear from both the hearing testimony and the declaration itself that Mr. Rockwell did the photo simulation analysis, and for evidential purposes the declaration will be regarded as his work alone.

8. SE 144th Street is an urban collector arterial with shoulders exceeding eight feet in width at most locations. It marks the southern boundary of an established residential neighborhood on the upland plateau lying east of the Renton city limits. The area is characterized by larger, often partially-wooded lots that lend the neighborhood a semi-rural character. South of SE 144th Street the terrain drops down into the Cedar River Valley. Many of the transitional upper slopes remain densely wooded, including the 38-acre Renton Fish and Game Club property lying about 800 feet east of the proposed site. The southern right-of-way shoulder of SE 144th Street is lined

with PSE utility poles, most of which seem to be at about the same height as the one under review for this application. In this immediate area there appear to exist no dedicated telecommunication transmission structures available for collocation use.

9. T-Mobile has performed for this application two studies of neighborhood alternative sites that might be considered as options for locating the proposed transmission facility. The first of these studies, dated August 27, 2009, provided an alternatives analysis for eight sites. A later analysis was done in December 2010 for an expanded selection of sites. The 2010 analysis also took into account the additional radio frequency (RF) coverage generated by the recent addition to the T-Mobile system of a 120-foot transmission facility located to the northeast near Lake Kathleen. The new Lake Kathleen facility fills in much of the coverage gap previously identified lying immediately east of the currently proposed pole site.
10. Exhibit 19, the 2010 updated alternatives analysis, is based on the RF propagation modeling presented in exhibit 23, which supplies coverage maps for the current proposal plus another 15 sites. As described by T-Mobile's RF engineer, Chris Martin, with the addition of the Lake Kathleen facility the current goal is to improve cell phone coverage to the south and southwest of SE 144th Street. T-Mobile's stated preference is to use the currently proposed facility to improve coverage toward the southwest in order to avoid having to install a taller pole on the slopes west of the site.
11. Mr. Martin identified four existing poles near the southern edge of the plateau that would meet generally T-Mobile's coverage needs. Sites F, H, I, and N as described in exhibit 19 are all located on the southern side of SE 144th Street. Poles located at sites F and I would offer satisfactory service coverage at the 100-foot height, whereas poles at sites H and N would require about 120 feet to provide adequate coverage. Site F is the current proposal while site I is a Frontier guy pole. T-Mobile eliminated the Frontier guy pole from consideration because Frontier does not allow telecommunication usage on their poles, plus this site would likely require tree removal. Site N at the corner of SE 144th Street and 171st Avenue SE has limited right-of-way space, is in a high traffic area and would need to be elevated to clear an adjacent tree.

Site H is a PSE pole located in the right-of-way for SE 144th Street adjacent to the northwest corner of the Renton Fish and Game Club property. Its location further east along the collector arterial would close some of the remaining coverage gaps south of Lake Kathleen at the expense of providing weaker coverage to the south and west. The Appellant also argued for consideration of alternative sites on the wooded Renton Fish and Game Club property itself, and a representative of the club indicated that the organization would be willing to talk to T-Mobile about that possibility. The Fish and Game Club property is currently enrolled in the county's open space current use taxation program, which qualifies it for a reduction in property taxes. While removal of a portion of the site from open space status is an option for the club, it would likely lower the annual current use tax benefit and might trigger a penalty provision. Based on the information in the record, one cannot conclude whether this would be an attractive option for the club membership once all the ramifications were explored and understood.

12. A second location proposed by the Appellant for consideration as a potential pole site is the existing PSE pole located at the northeast corner of the intersection of SE 142nd Street and 169th Avenue SE. This is not a specific candidate modeled by T-Mobile in its propagation studies or analyzed as an alternative. It is, however, located in between sites A and B evaluated in exhibits 19 and 23, which are other PSE poles along 169th Avenue SE. Comparing the propagation

- mapping for A and B with that provided for the T-Mobile preferred location at site F, one can infer that a SE 142nd Street/169th Avenue SE candidate would provide better coverage to the northwest but substantially less coverage to the south. As shown in the exhibit 58 photograph, this corner also appears to offer a much smaller width of unencumbered right-of-way than at the Appellant's preferred location and a resultant greater potential for conflicts with other uses. The Appellant also argued for consideration of a pole location directly across the street within the unopened street right-of-way for SE 142nd Street west of 169th Avenue SE, but the availability of that site is not currently known. Obtaining its usage would possibly require a road vacation procedure and might not meet required setbacks.
13. Due to the proximity of undeveloped properties, both location H and the SE 142nd Street/169th Avenue SE intersection have the potential for causing fewer visual impacts. Visual impacts at the corner location on 169th Avenue SE would mainly be to the two residences located on the south side of the intersection immediately to the west and east, both of which would have an unobstructed view of the pole at approximately 100 feet. The northeast corner house itself and the adjacent properties further north would largely be screened from the pole by existing evergreen trees. As for candidate H, its visual impacts would be mainly experienced by the residences along the northern side of SE 144th Street.
 14. The visual impacts of the current T-Mobile proposal at the site designated candidate F within the alternatives analyses would be concentrated primarily on three residential properties, all of which can be observed in the aerial photograph attached to exhibit 17. The larger visual impacts from the proposed new facility would be experienced, in descending order, by the Cherban property whose upstairs deck and living-room window are about 100 feet north of the proposed pole; by Appellant Little's property where the pole would be sited at its northeast lot corner; and by the Delgado property approximately 300 feet west at the northwest corner of SE 144th Street and 169th Avenue SE.
 15. The current view from the Cherban second-story deck is generally depicted in the exhibit 82 photograph. A tall hedge-screen blocks the view of the roadway, with the utility pole presently rising above the screen at about the level of the background trees. While we are not convinced that the exhibit 83 simulation is a reliably accurate rendition of the new pole's visual effect from the Cherban deck, there can be no doubt that the new facility as proposed would project well above the vegetation line into the southern sky. As shown in exhibit 82, the Cherban deck appears to have a peek-a-boo view through the trees across to the other side of the Cedar River Valley. While this view to the south may not be a major amenity, there is no question that the design and orientation of the Cherban house has been configured to take full advantage of this pleasant exposure.
 16. The primary impact to Appellant Little from the proposed pole extension derives from its sheer proximity. It is generally understood that the view potential in this neighborhood is south toward the valley and the sun, not north toward the arterial roadway. The north side of Ms. Little's house has a relatively small living room window located more or less in the center of the building about 50 feet southwest of the pole. The pole will no doubt be visible at an angle from that window, but probably not unless one makes a concerted attempt to look at it. So the major effect of the pole visually will be in the realm of its disproportionate size as one approaches the house from the outside.
 17. As shown in the aerial photograph attached to exhibit 17 and described in the hearing testimony, the Delgado residence has a second-story picture window that faces towards the southeast. The

view from this window would be slightly uphill directly toward the pole at a 300-foot distance. For the remainder of the neighborhood, views of the pole will either be screened by existing vegetation or lie at angles and locations beyond the primary viewing corridors.

18. At the end of hearing testimony on January 11, 2011, the parties were availed a further opportunity to each submit a declaration providing an analysis of the reliability of the various photographic simulations of the proposed pole previously offered to the hearing record. Both T-Mobile and Appellant Little submitted declarations that are responsive to that opportunity. As a general matter, the Examiner's interest here is to identify whether there are egregious distortions that need to be identified and considered. None of the photo simulations are suggestive of great precision, and it would seem to be an unwise exercise to attempt to make differential comparisons measured in inches. Except for perhaps exhibit 83, the height representations of the pole in the various photographic simulations appear to be within a reasonable margin of error. In terms of obvious exaggerations, Appellant Little's simulations do not include examples where just one set of antennas is present, and T-Mobile has studiously avoided representing the outside conduits in any meaningful way. There are also some predictable discrepancies in the sizes of the antennas, with the T-Mobile representations being a wee bit too short and the Appellant's representations perhaps a wee bit too long. To some degree this may be explained by the fact that within the exhibit 16 plan set sheet A-2 depicts the antenna length as 54 inches while sheet RF-2 states it to be 59 inches.
19. The most problematic of the photo simulations is exhibit 83, which purports to show the new pole as it would appear from the Cherban deck. While there is no doubt that the new pole would extend above the tree line, it is not clear that this photo simulation is reliable. As Mr. Rockwell himself acknowledged, the bottom of the pole can't be seen and at best can only be roughly inferred. Mr. Rockwell has used the visible patches of the street striping as references—and that may indeed be the best information available. It fails, however, to inspire great confidence. But the larger problem is, as Mr. Thomas's declaration observed, that the original photograph has been both scaled and rotated to a landscape orientation, thus likely resulting in a misrepresentation of relationships. On a non-technical level one can observe this distortion from the apparent degree of magnification error. The orange house on the left side of the photograph is about 130 feet away from the deck but appears much closer in exhibit 83. And if the far vegetated skyline represents the south side of the Cedar River Valley, it appears too close for a feature that must be more than a mile away. In light of these concerns, we decline to make a finding that exhibit 83 is an accurately-scaled representation of the proposed pole.
20. Two lesser concerns need to be addressed as well, noise and traffic. The claim that construction and installation of the vault and pole will cause exceptional noise and traffic problems is not supported by the record. This is a relatively minor construction project involving nothing unusual except perhaps tipping up the tall pole. If routine minor construction were to become a basis for denying a permit, then nothing would ever get built. Similarly, the issue regarding post-construction noise focuses on the need to operate a propane generator during power outages lasting more than eight hours, when the capacity of the backup battery system will be exceeded. There is no evidence that power outages greater than eight hours in duration are anything but a very rare event, and if one indeed does occur, T-Mobile's portable unit will hardly be the only generator in operation.

CONCLUSIONS:

1. The basic standard to be applied to the review of a threshold determination appeal is that the SEPA record must demonstrate the actual consideration of relevant environmental impacts. With respect to those relevant impacts shown to be actually considered, the decision of the SEPA official is entitled to substantial weight on review and shall not be overturned unless clearly erroneous based on the record as a whole.
2. Although noise and traffic impacts have also been alleged by the Appellant, the only potential adverse environmental impact of any consequence disclosed by the record is in the area of aesthetics. As evidenced by the MDNS condition requiring harmonious painting, fencing and landscaping, the visual impacts of the proposal were indeed considered by the DDES responsible official and informed the threshold determination process. As requested by the Applicant and stipulated to by DDES, the fencing and landscaping requirements will be deleted from the MDNS as no longer applicable to a revised proposal that plans to place the equipment cabinet underground.
3. This leaves us with the aesthetic impacts of the 100-foot pole, with its single antenna array at the top and its conduits running down the side. Aesthetic impacts involving visual effects are difficult to deal with precisely because they do not lend themselves easily to quantification. Past Hearing Examiner decisions have observed that in a residential area any tall pole will be visible to someone and have suggested that no significant aesthetic impact occurs unless the proposed facility siting impairs a valuable view or is simply so close to a more ordinary view that it dominates the perspective. A 100-foot pole in a residential neighborhood is always going to affect somebody, and a standard of zero visual impact can be attained only if no tall transmission poles are ever allowed.

Thus the essential consideration must be whether the proposed facility location will have visual impacts that are in some substantial degree out of the ordinary. Support for this approach can be found in the recent case of *Cingular Wireless vs. Thurston County*, 131 Wn App 736 (2006), which upheld the denial of a 150-foot monopole that would have “a looming presence over the adjacent community area” (131 Wn App at 772) in a neighborhood “marked by scenic vistas of farmland and Mount Rainier” (131 Wn App at 783).

4. No significant views will be impaired by the placement of a 100-foot pole at the location on SE 144th Street proposed by T-Mobile. From a view amenity standpoint, the most serious impact will be to the Cherban property directly north of the pole. It has a pleasant viewscape from its upper story through the hillside trees that catches a glimpse of the far side of the Cedar River Valley. All other properties that see the pole will view it in the context of other houses and roadside development.
5. The pole will certainly be close enough to Appellant Little’s living room window to be potentially dominant. However, it will not be seen in front of the window but at an oblique angle. And it will be in a location where a utility pole already exists. No evidence has been introduced suggesting that an individual sitting in the Appellant’s living room looking out the window will either encounter the pole in the customary line of vision or experience more of a visual intrusion from the new facility than currently exists with the present pole.
6. It perhaps may be argued that the T-Mobile pole at the currently proposed location will impact the views of three residences, while at the alternative sites preferred by the Appellant further east

on SE 144th Street or a block north on 169th Avenue SE it would only seriously affect as few as two residences. But either way the visual effects of the proposed pole will not be widespread. They will not have such a general impact as to create a looming presence over the community. No evidence has been offered that the visual consequences of siting the pole as proposed by T-Mobile will be of a substantially greater magnitude or different order than the customary and routine effects that would be experienced at any comparable residential location.

In the absence of an important view amenity or territorial vista, the localized effects of the T-Mobile proposal at the carrier's preferred site do not rise to an exceptional level. Such effects do not support a conclusion that a significant adverse environmental impact will be created. Moreover, both DDES and the Applicant have taken reasonable efforts to mitigate the visual impacts to a moderate level. A set of antennas have been removed, the pole and conduit profile has been narrowed, the equipment cabinet will be placed underground and antennas and conduits can be painted to match the wooden pole color. In addition, the conduits can be placed on either the north or south side of the pole so that the profile viewed by the nearest residences is minimized. Taken together these mitigation actions, combined with the inherent characteristics of the location, serve to reduce the aesthetic impacts of the proposal to a less than significant level.

7. KCC 21A.44.040 requires an applicant for a CUP to demonstrate compliance with the standards of the section. Those that are arguably applicable to this proceeding include the following:
 - A. The conditional use is designed in a manner which is compatible with the character and appearance of an existing, or proposed development in the vicinity of the subject property;
 - B. The location, size and height of buildings, structures, walls and fences, and screening vegetation for the conditional use shall not hinder neighborhood circulation or discourage the permitted development or use of neighboring properties;
 - C. The conditional use is designed in a manner that is compatible with the physical characteristics of the subject property;...
 - E. The conditional use is not in conflict with the health and safety of the community;
 - F. The conditional use is such that pedestrian and vehicular traffic associated with the use will not be hazardous or conflict with existing and anticipated traffic in the neighborhood;...
 - H. The conditional use is not in conflict with the policies of the Comprehensive Plan or the basic purposes of this title.

In addition, KCC 21A.02.040 provides that no use or structure shall be established or constructed except in conformance with the requirements of Title 21A. For cellular transmission structures this means that review on appeal also includes consideration of whether the requirements of KCC 21A.26 have been met.

8. Of the conditional use standards set out at KCC 21A.44.040, the requirements stated at subsections E, F and H are only of minor interest in this proceeding. Had the evidence demonstrated serious issues with respect to either noise or traffic, subsections E and F might have come into play. But on the record before us those CUP requirements must be deemed met. As for subsection H, the applicable policies of the Comprehensive Plan generally parallel the requirements of KCC Chapter 21A.26, and compliance with chapter requirements is equivalent to meeting Comprehensive Plan policies. T-Mobile's attorney has suggested that the Examiner has conflated conditional use standards A and C, but that is not quite accurate. No one has suggested that the transmission facility will not be compatible with the physical characteristics of the street right-of-way; therefore subsection C has never been a factor in the review.
9. To the extent that issue no. 1 within the pre-hearing order may have blended the CUP standards, it would be subsections A and B of KCC 21A.44.040 that were combined. Subsection A requires the project design to be compatible with the character and appearance of existing or proposed development in the vicinity, and B mandates that the location, size and height of structures not discourage the permitted development or use of neighboring properties. A combination occurs within issue no. 1 to the extent that the incompatibility referenced in subsection A in most instances would also be the element of the proposal under B that would discourage the permitted use of neighboring residential properties.

(Perhaps the oddest argument so far in this proceeding is Ms. Atkins's suggestion that within subsection A the term "an existing...development" should be read with primary emphasis on the article "an." If taken seriously, this reading would appear to suggest a denial of the 100-foot pole application unless there were already in the area an existing similar development to justify its approval.)

10. Utility development, including telecommunications facilities for wireless telephone service, clearly is not incompatible per se with the King County Code. And the underlying Comprehensive Plan policies emphasize the public benefits to county residents derived from a robust telecommunications infrastructure. So the question of compatibility under the CUP standards comes down to the size and height of the proposed structure at the location proposed, which review leads us into the same kinds of concerns about visual impacts that informed our earlier discussion under SEPA. Incompatibility with the neighborhood means placing a facility in a location where its height and mass have an unacceptable visual effect by impairing a valuable view or scenic vista that is enjoyed by a significant portion of the community. The standard necessarily looks to an impact that goes beyond mere visibility to a handful of residences and passing traffic. It is also a review that overlaps with and to some degree is manifested in the requirements of KCC Chapter 21A.26.
11. One of the unresolved issues within this proceeding is whether a new transmission structure that replaces an existing utility pole but greatly exceeds its height is entitled to the preferential treatment accorded by KCC 21A.26.400; or whether, alternatively, due to its much greater height it needs to be regarded as a new free-standing tower subject to the more demanding requirements of KCC 21A.26.370. The basic standard set forth at KCC 21A.26.320 provides that a new transmission support structure in an R-4 zone exceeding 60 feet in height requires a CUP. But KCC 21A.26.400.A informs us that mounting an antenna on an existing electrical utility pole within a public right-of-way is permitted outright if the replacement structure does not exceed to original pole height by more than 40 feet. Moreover, subsection B states that mounting an antenna on a replacement structure within a right-of-way "is the preferred alternative in residential neighborhoods." The section fails to specify, however, what regulatory treatment is

to be accorded to a replacement structure that exceeds the existing pole by more than 40 feet. DDES and the Applicant argue that exceeding the 40-foot overage limit simply underscores that a CUP is also required, but that the facility otherwise is entitled to the favorable treatment accorded to replacement structures under KCC 21A.26.400. The opposing viewpoint would be that replacement structures exceeding the 40-foot limit become by default “new free-standing towers” subject to the stricter requirements of KCC 21A.26.370.

12. The regulatory context indicates that the interpretation propounded by DDES and the Applicant is the better one. As pointed out by their briefs, the definitions for the title provided in KCC Chapter 21A.06 offer some needed clarification. The definition for “transmission support structure” at KCC 21A.06.1320 draws a clear line between communication equipment towers and electric utility poles, a distinction that suggests that a utility pole that later becomes taller and takes on a multiple usage does not thereby forfeit its original character. And at KCC 21A.06.998, the definition for “replace” specifically provides that replacement may involve an expansion. In other words a replacement structure does not automatically lose its character simply because it gets bigger.

Finally, though not cited by the parties, support for the conclusion that a replacement utility pole does not lose its original character and become a new free-standing tower by growing larger is provided by KCC 21A.26.370.C. This section deals with the question of collocation requirements as they apply to new free-standing towers. Subsection C specifies that “prior to the receipt of a building permit to construct a new tower, the applicant shall file a letter agreeing to allow collocation on the tower.” Since a replacement utility pole at whatever height continues to be the property of the electric utility, a cell tower applicant contracting to use the pole has no ultimate power to authorize a future collocation use. Thus KCC 21A.26.370.C implicitly assumes that no circumstances can arise under which replacement of an existing utility pole results in a new free-standing tower. The regulatory scheme overall therefore supports a conclusion that a replacement pole that exceeds the height of an existing utility pole by more than 40 feet remains the preferred alternative in a residential neighborhood, as provided by KCC 21A.26.400.B. It is thus exempt from the alternative sites analysis provisions applicable to new free-standing towers under KCC 21A.26.370.

13. KCC 21A.26.330 provides the visual compatibility standards that all minor communication facilities must meet in addition to the more general CUP requirements. Application of these standards requires consideration be given to “engineering and structural requirements, and the coverage patterns the provider is seeking to achieve.” KCC 21A.26.330.A mandates that the antenna “reflect the visual characteristics of the structure to which it is attached...through the use of colors and materials.” DDES has applied this requirement through its MDNS condition necessitating that the antenna be painted to match the wooden pole. Subsection B specifies that transmission support structures themselves be designed to blend in with the existing surroundings to the extent feasible, again through the use of compatible colors and materials, alternative placement of the structure on the site and screening. Use of the existing PSE location pole achieves this to the limited extent possible by siting the structure on the boundary line between two residential lots, away from the direct line of sight of residential windows. KCC 21A.26.330.C allows setbacks to be modified to achieve greater levels of screening, a tool that does not apply to development in road rights-of-way.
14. In summary, as a replacement tower subject to preferential treatment under KCC 21A.26.400, the proposed T-Mobile facility meets the rather modest visual compatibility standards of KCC 21A.26.330 and is not subject to the alternatives sites requirement of KCC 21A.26.370. And to

the extent that there may be interplay between the Chapter 21A.26 requirements and the CUP standards, one must conclude that a replacement pole within the public road right-of-way should not be deemed incompatible with the neighborhood unless it has egregious visual impacts greater than those attendant to other nearby utility pole locations with equivalent coverage potential. In the current instance, T-Mobile's preferred location provides the best coverage potential within the context of its stated goals, and its visual impacts are not substantially greater than other potentially available and feasible locations. The T-Mobile application meets both the specific requirements of KCC 21A.26 and the conditional use standards stated at KCC 21A.44.040, and the Little appeal must be denied.

DECISION:

The CUP and SEPA appeals of Barbara Little are DENIED. The SEPA appeal of T-Mobile is GRANTED. The following conditions of approval, which include a modification of the MDNS dated July 20, 2010, shall apply to siting, construction and operation of the proposed minor communications facility:

SEPA

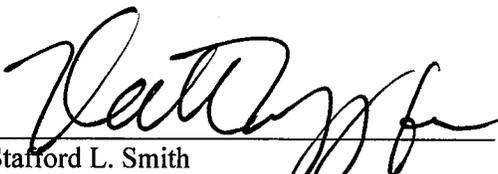
1. The Applicant shall install backup power capable of providing a minimum of eight hours of emergency electrical service to the base station. If backup batteries are incorporated for this purpose, they shall be contained in a safe manner to prevent potential leakage. (KCC Chapter 8)
2. The antennas, conduits and associated equipment mounted on the transmission tower shall be painted to blend with the wooden pole. (KCC Chapter 8, KCC 21A.26)

Conditional Use Permit

3. Development shall be generally in accordance with the proposal as described within this report, the CUP application and the full-size drawings revised December 27, 2010. Minor plan revisions may be approved by DDES to ensure compliance with county codes and the conditions of this approval.
4. Applicant shall file a letter with DDES consenting to allow collocation on the tower, subject to agreement from PSE and condition no. 5 below. The letter shall commit the Applicant to provide, either at a market rate cost or at another cost basis agreeable to the affected parties, the opportunity to collocate the antenna of other service providers on the Applicant's pole to the extent that such collocation is technically and structurally feasible.
5. No modifications to increase the height of the tower above 100 feet nor to add more antennas shall be authorized without a new CUP.
6. No antenna shall extend more than two feet horizontally from the pole to which it is attached.
7. The equipment shall be placed in an underground vault within the right-of-way.
8. The Applicant shall submit a copy of the right-of-way use permit.
9. Existing trees and other vegetation along the property line shall remain.

10. Any noise generated by this proposal shall conform with the provisions of King County Code Title 12.
11. Should this replacement pole or structure no longer be used for communication transmissions in the future, the Applicant shall remove the communications hardware and restore the pole to its original height, obtaining such permits as may be required for removal of all facilities no longer in use. This removal and restoration shall occur within one year from the date operations onsite are discontinued.
12. The conduits serving the antennas shall be placed on the south side of the pole; provided that, within 14 days of the date of this decision Appellant Little may submit a request in writing to DDES that they be relocated to the north side. Such design modification shall be approved unless the Applicant demonstrates it to be technically infeasible.

ORDERED this 3rd day of February, 2011.



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

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the county regarding conditional use appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly 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.)

MINUTES OF THE JANUARY 10, 2011, PUBLIC HEARING ON THE CONDITIONAL USE PERMIT AND SEPA APPEALS OF BARBARA LITTLE AND T-MOBILE, DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L09CU009.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Kimberly Claussen representing the Department; Linda Atkins representing T-Mobile; Appellant Barbara Little, Peter Rockwell, Michael Cady, Chris Martin, and Janet Cherban.

The following exhibits were offered and entered into the record:

Exhibit 1	DDES file no. L09CU009
Exhibit 2A	DDES Report and Decision on CUP, issued March 25, 2010
Exhibit 2B	DDES Report to the Hearing Examiner for the January 10, 2011 hearing
Exhibit 3	CUP application submitted August 27, 2009 and completed October 15, 2009
Exhibit 4	SEPA environmental checklist received August 27, 2009
Exhibit 5A	MDNS issued March 25, 2010
Exhibit 5B	Revised MDNS, issued July 29, 2010

Exhibit 6	Affidavit of Posting, indicating posting date of November 2, 2009
Exhibit 7	Project plans, received August 27, 2009
Exhibit 8	Right-of-way utility construction permit preliminary approval issued January 21, 2009
Exhibit 9	Report on May 26, 2009 community meeting
Exhibit 10A	Barbara Little's notice of CUP appeal, received April 12, 2010
Exhibit 10B	Barbara Little's statement of CUP appeal, received April 19, 2010
Exhibit 11	T-Mobile's alternatives analysis, included with application
Exhibit 12	Little SEPA appeal
Exhibit 13	T-Mobile SEPA appeal
Exhibit 14A	T-Mobile's excerpts of DDES file, volume I
Exhibit 14B	T-Mobile's excerpts of DDES file, volume II
Exhibit 15	Resume of Michael Cady
Exhibit 16	Project plans, revised December 27, 2010
Exhibit 17	Photographs depicting view of pole as originally designed
Exhibit 18	Photographs depicting view of revised design pole
Exhibit 19	T-Mobile's site candidate alternatives
Exhibit 20	Declaration of B. J. Thomas, dated December 27, 2010
Exhibit 21	Resume of Chris Martin
Exhibit 22	RF engineer site analysis dated August 21, 2009
Exhibit 23	RF propagation maps
Exhibit 24	Three photographs of Lake Kathleen cell tower
Exhibit 51	Printscreen of iMap: T-Mobile target area
Exhibit 52	Printscreen of iMap: area of proposed tower
Exhibit 53	Printscreen of iMap: target area with contours
Exhibit 82	Photograph of current view of proposed tower location from Janet Cherban home
Exhibit 83	Photograph of view of mock-up of proposed cell tower from Janet Cherban home

MINUTES OF THE JANUARY 11, 2011, PUBLIC HEARING ON THE CONDITIONAL USE PERMIT AND SEPA APPEALS OF BARBARA LITTLE AND T-MOBILE, DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L09CU009

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Kimberly Claussen representing the Department; Linda Atkins representing T-Mobile; Appellant Barbara Little, Peter Rockwell, Chris Martin, Barbara Francavilla and Wayne McCann.

The following further exhibits were offered and entered into the record:

Exhibit 55	Photograph of base of Lake Kathleen cell tower
Exhibit 56	Photograph of top of Lake Kathleen cell tower
Exhibit 58	Photograph of the northeast corner of the intersection of 169th SE and SE 142nd
Exhibit 59	Photograph of the southeast corner of the intersection of 169th SE and SE 142nd
Exhibit 60	Photograph of the intersection of 169th SE and SE 142nd from the east
Exhibit 61	Photograph of the 169th SE from the north
Exhibit 62	Photograph of Sprint cell tower located in Cougar Mountain Park
Exhibit 63	Photograph of Sprint cell tower located in Cougar Mountain Park
Exhibit 64	Photograph of Sprint cell tower located in Cougar Mountain Park
Exhibit 65	Photograph of Sprint cell tower located in Cougar Mountain Park
Exhibit 66	Photograph of driveway entrance to Renton Fish and Game Club, Inc.

- Exhibit 69 Aerial photograph of subject area including topographical overlay
Exhibit 71 Printscreen of coverage maps for subject area as downloaded from T-Mobile's commercial website on June 6, 2010
Exhibit 72 Printscreen of coverage maps for subject area as downloaded from T-Mobile's commercial website on December 27, 2010
Exhibit 73 Printscreen of coverage maps for subject area as downloaded from T-Mobile's commercial website on June 6, 2010 (magnified version of exhibit 72)
Exhibit 74 Photograph of proposed cell tower location
Exhibit 75 Photograph of proposed site with mock-up of proposed cell tower
Exhibit 76 Letter from neighborhood resident Sheryl FitzPatrick dated January 9, 2011
Exhibit 77 Photograph of the proposed cell tower location
Exhibit 78 Photograph of the proposed site with mock-up of proposed cell tower
Exhibit 79 Letter from neighborhood resident Samuel Delgado dated January 9, 2011
Exhibit 80 Photograph of the proposed cell tower location
Exhibit 81 Photograph of the proposed site with mock-up of proposed cell tower
Exhibit 84 Letter from neighborhood resident Steve Gray dated January 9, 2011
Exhibit 85 Letter from neighborhood resident Terry Woodland-McFarlane dated January 9, 2011
Exhibit 86 Letter from neighborhood business person Wayne McCann dated January 9, 2011
Exhibit 89 Photograph of the northeast corner of the intersection of 169th SE and SE 142nd
Exhibit 90 Photograph of the northeast corner of the intersection of 169th SE and SE 142nd
Exhibit 91 Photocopy of description of T-Mobile Samsung phone

On January 19, 2011, the following further exhibits were entered into the record:

- Exhibit 92 Declaration of B.J. Thomas regarding photo simulations
Exhibit 93 Barbara Little's declaration regarding visual representations of proposed cellular tower

SLS :vsm
L09CU009 RPT