Cynthia F. Adkins
John F. Harris
[redacted]

July 16, 2014

To: City of Medina Hearing Examiner

Re: PL-13-031 (SUP) and PL-13-032 (Variance)

Dear Hearing Examiner,

Please see attached for our comments to these matters. We hope they are useful as you undertake your review of this project. Thank you for your consideration in this matter.

Sincerely,

Cynthia F. Adkins

John F. Harris

Attachments:

1. General overview of issues
2. Information on aesthetics, including two journal articles
3. Comments regarding outside of area defined as Adjacent
4. Comments regarding failure to demonstrate least intrusive
5. Comments regarding failure to demonstrate need
6. Comments regarding 35-foot height limit
7. Comments regarding requested variance from 500-foot setback
8. Letter rebutting the staff report
9. Comments regarding design option notice from city
10. Comments regarding DNS
11. Copy of Hunts Point folder for new tower in Hunts Point

SUBMISSION FROM CYNTHIA F. ADKINS AND JOHN F. HARRIS

Attachment #1

City of Medina & Independent Towers/T-Mobile
PL-13-031 (SUP), PL-13-032 (Variance), and PL-13-033 (SEPA)
July 16, 2014

GENERAL OVERVIEW OF ISSUES

SUP SHOULD BE DENIED ON THE FOLLOWING GROUNDS:

Here is a general overview of the issues we identified with respect to this Project:

1. **SUBJECT PROPERTY NOT ZONED FOR WIRELESS COMMUNICATION FACILITIES USAGE (20.37.060)**

    a. **Site not Adjacent:** Applicant proposes wireless carrier facility usage in an area not adjacent to state highway ROW and the Code only permits wireless carrier facility in areas ADJACENT to state highway ROW.

    b. **Nature Preserve vs. Park:** Applicant proposes wireless carrier facility usage in Fairweather Park, and the Code only permits wireless carrier facility in Fairweather Nature Preserve that is nonforested.

    *Proposed site not zoned for wireless carrier facility and therefore the SUP must be denied; even if Applicant were to move to request a use variance for its wireless carrier facility at the subject property, the granting of a use variance is prohibited.

2. **APPLICANT FAILS TO DEMONSTRATE COMPLIANCE WITH REQUIREMENTS IMPOSED FOR WIRELESS COMMUNICATION FACILITIES WITH ANTENNAS MOUNTED TO MONOPOLES (20.37.070(B)):**

    a. **Aesthetics:**
        i. Design of monopole must use existing trees, mature vegetation, etc., to screen total facility from prevalent views; blend total facility into background; and integrate existing trees and mature vegetation with concealment requirements.
        ii. Placement of monopole must use existing trees, mature vegetation, etc., to screen total facility from prevalent views; blend total facility into background; and integrate existing trees and mature vegetation with concealment requirements.

    b. **Applicant fails to meet requirements for a height over 35 feet, and therefore if approved the monopole, including antenna, cannot exceed 35 feet in total.** Increase in height only permitted if:
        i. Increase in height only permitted to the minimum height necessary to avoid a significant gap in coverage on 520 bridge; in this case, Applicant

has not demonstrated that there is a significant gap in coverage on 520 bridge;

ii. wireless carrier facility must be located in that portion of Fairweather Nature Preserve zoned for wireless carrier facility usage; in this case, Applicant proposes a site in Fairweather Park, which is not allowed; and

iii. All other applicable provisions of this chapter are followed; in this case, the list of substantive defects is overwhelming.

c. **500-feet:** Applicant fails to comply with requirement that wireless carrier facility be placed at least 500 feet away from the property line of all residential properties.

d. **Applicant's design does not include concealment techniques required by law to minimize visual impacts and provide appropriate screening** (design consistent with residential character, least intrusive (including with respect to height and mass) and takes into account informal landscaping that contributes to distinctive setting of the community.)

3. **APPLICANT'S WIRELESS COMMUNICATION FACILITY FAILS TO COMPLY WITH CONCEALMENT REQUIREMENTS. (20.37.100).**
   a. Law requires that the Applicant screen, hide or disguise its wireless carrier facility to make them visually inconspicuous to surrounding properties and city streets. Applicant has failed to design its facility in a way that prevents the facility from visually dominating the surrounding area. It will be the most dominant part of the grassy field, singularly industrial in an otherwise natural park and neighborhood.

4. **APPLICANT FAILS TO DEMONSTRATE COMPLIANCE WITH THE GOOD FAITH CO-LOCATION EFFORTS REQUIRED BY LAW**
   a. Applicant is required to demonstrate good faith co-location efforts; Applicant failed to submit sufficiently detailed evidence showing a good faith effort and therefore SUP should be denied.

5. **APPLICANT FAILS TO PROVIDE ALL INFORMATION REQUIRED BY 20.37.130 (APPLICATION SUBMITTAL REQUIREMENTS)**
   a. Required information that is missing or omitted includes:

   (1) information and maps demonstrating a need for the facility (information and maps provided are either irrelevant, as they use antenna pinpoints to the south of 520 lid, or are incomplete (such as the omission of new tower at Hunts Point, which is less than 3,000 feet away from Fairweather Park location), and also fail

to include and show all of the carrier's sites within a one-mile radius of Medina boundary), and

(2) **valid lease** with City of Medina.

i. Lease invalid due to (A) City's failure to follow SEPA, and (B) City's failure to notarize its signature. Also, the lease is exclusive, and City code prohibits exclusive leases.
ii. Note that a valid lease is also a requirement under 19.02.060

6. APPLICANT FAILS TO DEMONSTRATE NEED FOR FACILITY

a. Fails to demonstrate and submit satisfactory evidence that the facility is designed for and will provide services primarily to Medina residents and visitors. The evidence suggests that the primary purpose of this site is to manage bandwidth along 520 and help ensure no dropped calls along 520.
b. Fails to demonstrate that proposed facilities are least intrusive on residential setting of community (aesthetics, height, mass, etc.)
c. Fails to demonstrate that its services for Medina residents and visitors can't be provided using other facilities, existing or planned, that are inside or outside of the City
d. Fails to demonstrate that it can't fulfill the need for the facility with other sites available (available now) outside of the City
e. Fails to demonstrate how the type of facility, and its location, is least intrusive upon the surrounding area
f. Fails to provide relevant propagation studies and maps that support its need for a new wireless carrier facility (information and maps provided are either irrelevant, as they use pinpoints to the south of 520 lid, or are incomplete (including omission of new tower at Hunts Point, which is less than 3,000 feet away from Fairweather Park location), and also fail to include and show all of carrier's sites within a one-mile radius of Medina boundary).

7. APPLICANT'S SUBMISSION FAILS TO PROTECT THE PUBLIC HEALTH, SAFETY AND WELFARE

a. Aesthetics, both for aesthetics and for negative impact on property values:

The Applicant failed to provide adequate information regarding the visual impact of the project. What's missing is substantive, robust and contextually relevant information on, first, the overall visual and aesthetic quality of the Fairweather Area, second, the visual and aesthetic experience and expectations of viewers (including residents, users of the park, pedestrians, bicylists and motorists), and, third, the scale and contrast between existing and proposed elements in the area. A meaningful systematic and objective evaluation of the visual impact of

the project requires the missing information. From a layperson's perspective, the proposed facility has a significant adverse impact on nearby properties and on the neighborhood. It would be a permanent, prominent industrial and visual blight on the only park and open space area in our North Point neighborhood. It will forever ruin our views, and, because of the non-stop noise from the industrial equipment, we will never again enjoy a quiet evening on the park. The proposed project would be both a visual and industrial blight, chasing us off our park.

b. Environment: The City failed to require Applicant to submit full and complete information about the environmental impacts of its proposed facility. The Applicant's SEPA checklist was sloppy and misleading at best, and the City failed to hold them accountable. For example, Medina residents requested professionally rendered view sheds from the most impacted areas (including, for example, the homes with impacted viewsheds) and a balloon test, but the City decided not to require this of the Applicant. Also, given that the proposed site is on the playfield, it seems likely that the Applicant's risk management advisors will suggest fencing off the entire facility, or perhaps even the entire leased area (which under the lease is exclusively for the use of Applicant), which should be taken into account when evaluating the view-shed issues. Because environmental impact is a fact-based analysis, and because there was inadequate information about the actual impact of the project on this environment, the City's determination that the project's impact is "non-significant" is not supported by the City's record. While I opted not to file a SEPA appeal, I believe the facts would have given me a favorable chance of prevailing had I submitted an appeal. Furthermore, even though I did not file a SEPA appeal, the City's code still requires that this project comply with the City's Comprehensive Plan and that the health, safety and welfare of the residents and surrounding properties be protected, and, therefore, if this project is conditionally approved, a robust analysis of the environmental impacts should be required.

c. Safety: The Applicant has failed to provide adequate assurances about how it will protect the boys and girls who play at the park, and the neighboring homes, from the inherent risks of fire, explosion, and tower collapse. Without a tower at Fairview, we are exposed to none of these risks.

8. **APPLICANT'S SUBMISSION FAILS TO COMPLY WITH MEDINA'S COMPREHENSIVE PLAN AND PARKS PLAN**

a. The size and scale and location of this proposed project is completely unjustified and is directly at odds with the City's Comprehensive Plan. T-Mobile used to be on a utility pole, and it can go back onto a utility pole.

VARIANCE FROM 500 FOOT REQUIREMENT SHOULD BE DENIED

1. **THERE ARE LOCATIONS AVAILABLE THAT ARE 500 FEET AWAY FROM HOMES, AND THOSE LOCATIONS SHOULD BE EXPLORED AS POSSIBLE SITES**
   a. Applicant has failed to submit adequate data and information to prove that there are no substitute locations that are 500 feet away from homes. On information and belief, the following areas near Evergreen Point Road have sites that do not violate the 500 foot setback: the golf course, the SE portion of the new 520 lid, and the SE portion of nonforested area in Fairweather Nature Preserve.

VARIANCE FROM UNDERGROUNDING

1. **APPLICANT HAS NOT DEMONSTRATED JUSTIFICATION FOR RELIEF FROM UNDERGROUNDING REQUIREMENT**

CITY'S RECOMMENDATION ON THE SUP SHOULD BE DISREGARDED

1. **THE CITY WAS FORCED TO RELY ON INCOMPLETE AND INACCURATE INFORMATION PROVIDED BY INDEPENDENT TOWERS IN REACHING A CONCLUSION THAT THE SUP SHOULD BE APPROVED.** A meaningful systematic and objective evaluation of the project requires full and complete information.

2. **THE RECOMMENDATION SHOULD ALSO BE DISREGARDED DUE TO THE CITY'S INHERENT FINANCIAL CONFLICT OF INTEREST AS LANDLORD TO INDEPENDENT TOWERS IN ADDITION**

3. **THE CITY'S FAILURE TO IDENTIFY THE GAPS AND ERRORS IN THE INFORMATION SUBMITTED BY INDEPENDENT TOWERS CALLS INTO QUESTION THE DILIGENCE OF THE CITY IN EVALUATING THE PROPOSAL**

Attachment #2

SUBMISSION FROM CYNTHIA F. ADKINS AND JOHN F. HARRIS

City of Medina & Independent Towers/T-Mobile
PL-13-031 (SUP), PL-13-032 (Variance), and PL-13-033 (SEPA)
July 16, 2014

Aesthetics

The proposed facility would have a significant adverse impact on nearby properties and on the neighborhood. It would be a permanent, prominent industrial and visual blight on the one and only park and open space area in our North Point neighborhood. It will forever ruin our views, and, because of the non-stop noise from the equipment, we will never again enjoy a quiet evening on the park or in yards.

Our Washington and West Coast courts, the Ninth Circuit in particular, are fiercely protective of a city's right to regulate aesthetics and control the "time, place and manner" of the location and installation of wireless network infrastructure. Please see attached: Aesthetics and Cell Towers – Cities and Carriers Duking It Out in the Courts, Paul J. Weinberg, Zoning and Planning Law Report, February 2011, Vol. 34, No. 2.

ZONING AND PLANNING LAW REPORT

FEBRUARY 2011 | Vol. 34 | No. 2

AESTHETICS AND CELL TOWERS— CITIES AND CARRIERS DUKING IT OUT IN THE COURTS

Paul J. Weinberg

Paul Weinberg is a real property attorney practicing in Irvine, California. Since 1979, his Orange County practice has specialized in real estate, title, leasing, and real property development matters. Paul is the only non-architect member of the Laguna Beach, California Architectural Guild and acts as their legal counsel. He is a member of the Society of Architectural Historians and the American Institute of Architects. Paul has also served on the faculty at the University of California, Hastings College of Law in San Francisco, where he has taught civil trial practice, as well as teaching real property topics for the University's Continuing Education of the Bar, where he has moderated panels on a wide variety of real property topics statewide since 1988. He also authors articles for the University of California's Continuing Education of the Bar Real Property Law Reporter, and West's National Real Property Law Journal. In 1998, Paul announced the formation and opening of a private mediation service devoted to the resolution of real property disputes. See http://www.pjwmediation.com.

Some urban problems never resolve; in colloquial terms, "the can gets kicked down the road." This article talks in some depth about a lingering, nagging problem that has been facing cities and their denizens since the advent of wireless telecommunication and cell phones, now ubiquitous. That problem is where to put the poles and the equipment so that the aesthetics of the landscape aren't interfered with, and the residents aren't frightened or worried about exposure to radio frequency radiation or other potentially harmful effects from having this equipment placed in their neighborhoods.

And a neighborhood problem it is, too. Increasingly, across the United States, the attempts to install these poles and equipment are polarizing neighborhoods and creating a grass-roots opposition which, while not professional, is extremely well organized and now has proliferated into both urban and rural communities alike. This article will talk about the scope of that expansion, the issues that underlie it and how the courts, the Federal courts in particular, are coming to grips with the collision between aesthetics and the right and need for wireless telecommunication facilities.

Clearly, the opposition has the carriers worried; this showed up in an amicus brief filed by a large wireless infrastructure provider in a very recent appeal to the U.S. Supreme Court:

> *Amici curiae* NextG Networks of California, Inc. and The DAS Forum support Sprint's Peti-

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> tion for Certiorari because the Ninth Circuit's en banc decision ... presents an important case of national interest. The Ninth Circuit's narrow reading of Section 253(a) in this case is directly contrary to the intent of Congress, the policy goals of the Federal Communications Commission ... and the interpretation of Section 253 by the FCC and several other Circuit Courts. *If uncorrected, the Ninth Circuit's en banc decision likely will embolden local governments to erect regulatory regimes so Byzantine as to have the effect of thwarting the deployment of advanced telecommunications technologies and competitive telecommunication services. While unacceptable in any context, the costs, burdens, delays, and uncertainty imposed by such municipal requirements will be particularly detrimental to the ability of new entrants, such as NextG and other DAS Forum members, to enter the market.*[1]

There is no question that a lot of money is at stake in this battle; the carriers and their public relations entity, the Distributed Antenna Systems (DAS) Forum, have made that clear in their own conferences and other public gatherings. On its website, the DAS Forum describes itself as:

> [A] broad-based nonprofit organization, dedicated to the development of the DAS component of the nation's wireless network[.] Founded in 2006, the DAS Forum is the only national network of leaders focused exclusively on shaping the future of DAS as a viable complement to traditional macro cell sites and a solution to the deployment of wireless services in challenging environments."[2]

The DAS Forum is comprised of large telecommunication entities and their suppliers, including Sprint Nextel, T-Mobile, Extenet Systems, and suppliers such as Corning Cable Systems and American Tower Corporation. What's especially interesting, though, is the volume of money that is at stake. On a web page advertising a June 15, 2010, conference, the DAS Forum said "Learn why DAS is a magnet for private equity and venture capital money, attracting more than $1/2 billion in the last year alone."[3] This is a staggering number, so high as to potentially warp traditional land use decisions, making them susceptible to political influence and a magnet for sophisticated, skilled land use consultants and political operatives.

Distributed Antenna Systems, as a technology, is the latest iteration of an old maxim called "Moore's Law," enumerated in 1965 by Intel co-founder Gordon E. Moore. As Wikipedia puts it:

> Moore's Law describes a long-term trend in the history of computing hardware. The number of transistors that can be placed inexpensively on an integrated circuit has doubled approximately every two years. The trend has continued for more than half a century and is not expected to stop until 2015 or later.[4]

The DAS system, described by the DAS Forum itself, is a lightweight and smaller exponent of the prior taller, larger cellphone towers that preceded it:

> A DAS network is, basically, a series of small antennas located on utility or streetlight poles in public rights-of-way or utility easements that are interconnected by fiber optic lines. Where a traditional "macro" wireless cell site such as a tower or monopole typically has a full complement of electronic network equipment located at the site with the antenna, the DAS network splits that traditional cell by placing the electronic network equipment at a central "hub" location and routing the signals to and from the remote antenna "nodes" via the fiber optic lines.
>
> These DAS networks facilitate a greater re-use of the wireless spectrum, since the antennas define small radio coverage cells isolated from each other, each carrying the same capacity and quality as a network delivered by traditional means. In addition, a DAS network in an urban area can provide coverage in many areas or "dead spots" that may be "shadowed" from coverage by the traditional antenna locations. Higher capacity and greater coverage in turn are the necessary building blocks for new, content-intensive wireless telecommunications services that are in demand by consumers. *DAS networks also take advantage of existing rights-of-way infrastructure, in the same way as traditional, purely wireline telephone systems.*"[5]

The DAS Forum and the wireless telecommunications entities that are its members are beginning a wave of litigation to compel the granting of land use permits for installation of these antennae and ancillary equipment across the country. What makes this wave of litigation different from its forebears is that, under the DAS system, the telecommunication companies get to "piggyback" onto existing telephone poles, light poles and other previously-erected structures rather than having to construct, erect and maintain cell towers that can easily exceed 140 feet in height. On the surface, it would appear to be a win-win situation: The equipment has now shrunk and no new structures have to be built to accommodate it; the existing aesthetics won't be interfered with because existing installations will simply be modified to accommodate the new equipment.

On the surface, Distributed Antenna Systems technology would appear to be a win-win situation: The equipment has now shrunk and no new structures have to be built to accommodate it.

Is this in fact the case? If so, then why the proliferation of this litigation, and why are cities actively resisting allowing these installations to be constructed without the right to regulate their aesthetics, including the manner and method of installation as well as the location?

To put this problem into proper context, three Federal court cases dealing with the problems need to be reviewed. The 2008 Ninth Circuit case of *Sprint Telephony PCS v. County of San Diego*[6] is probably the best place to start, because it was the signal that the law was changing and that courts were going to more zealously uphold the rights and abilities of municipalities to control the "time, place and manner" of the location and installation of the wireless network infrastructure.

The County of San Diego enacted an ordinance to "establish comprehensive guidelines for the placement, design and processing of wireless telecommunications facilities in all zones within the County of San Diego."[7] The County set up four tiers of categories in the ordinance, depending primarily on the visibility and location of the proposed facility. Criteria for approval of facilities were on a sliding scale; an application for a low-visibility structure in an industrial zone generally was subject to lesser requirements than an application for a large tower in a residential zone.

More relevant to the lawsuit, though, were the general zoning requirements. The ordinance required hearings before a zoning board, and the board had to make certain findings to allow the installation of the

wireless facilities. Not surprisingly, almost all of the findings related to planning and aesthetic standards:

> Before a permit is granted, the zoning board must find:
>
> > That the location, size, design and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to:
>
> 1. Harmony in scale, bulk, coverage and density;
> 2. The availability of public facilities, services and utilities;
> 3. The harmful effect, if any, upon desirable neighborhood character;
> 4. The generation of traffic and the capacity and physical character of surrounding streets;
> 5. The suitability of the site for the type and intensity of use or development which is proposed; and to
> 6. Any other relevant impact of the proposed use.
>
> The decision-maker retains discretionary authority to deny use permit application or to grant the application conditionally.[8]

Sprint came out of the gate with the position that the ordinance itself violated the supervening Federal law, 47 U.S.C.A. § 253(a). Section 253(a) provides that no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. Sprint argued that San Diego's ordinance, on its face, prohibited or had the effect of prohibiting Sprint's ability to provide wireless telecommunication services.[9] The County rejoined that § 253(a) did not apply to the ordinance, because another Federal statute, 47 U.S.C.A. § 332(c)(7), exclusively governs wireless regulations and (perhaps more importantly) that the ordinance wasn't an effective prohibition on the provision of wireless services. The County's position relied clearly on the fact that a specific, detailed set of criteria were set forth in the ordinance, rather than an outright prohibition.

The Ninth Circuit looked at both statutes. As to § 253(a), the court acknowledged the language therein that no State or local regulation could prohibit or have the effect of prohibiting the ability of an entity to provide telecommunication services. Interestingly, though, the Ninth Circuit did some independent research and found that, although the House of Representatives had originally proposed legislation requiring the FCC to regulate directly the placement of wireless telecommunications facilities, the House and Senate conferees decided instead to preserve the authority of State and local governments over zoning and land use matters, except in the limited circumstances set forth in the conference agreement.[10]

The Ninth Circuit also declaratively announced that 47 U.S.C.A. § 332(c)(7)(A) preserves the authority of local governments over zoning decisions regarding the placement and construction of wireless service facilities, subject to limitations enumerated elsewhere in the statute. The court stated, "One such limitation is that local regulations shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[11]

So, in a sense, the court was "telegraphing" its punch; to it, the statutes were clear. Zoning authority was to remain in the hands of local municipalities unless it had the effect of completely prohibiting wireless service. The court went on to review some appellate decisions that seemed to be at variance with that declarative standard, in particular *City of Auburn v. Qwest Corporation*.[12] The court took the dramatic step of overruling its own prior holding in the *Auburn* case. It was pretty clear that the Eighth Circuit had recently stung the court by rejecting the *Auburn* standard in the case of *Level 3 Communications, L.L.C. v. City of St. Louis, Mo.*[13] As the Ninth Circuit put it in the opinion:

> Recently, the Eighth Circuit rejected the *Auburn* standard and held that, to demonstrate preemption, a plaintiff "must show actual or effective prohibition, rather than the mere possibility of prohibition." [Citation omitted.] We find persuasive the Eighth Circuit's and district court's critique of *Auburn*. Section 253(a) provides that "[n]o State or local statute or regulation ... may prohibit or have the effect of prohibiting... provi[sion of]... telecommunication service." In context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in

> holding that "a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." [Citation omitted.][14]

Interestingly, the United States Supreme Court was then asked to review the *Level Three* case and the *Sprint Telephony* case by petitions for certiorari filed in both cases. The Supreme Court asked the Solicitor General to opine as to whether the Court should get involved in the dispute and, more pointedly, as the question was presented:

> Whether 47 U.S.C. 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" preempts only those state and local requirements that have an actual effect on the ability to provide service, as opposed to those that might have such an effect in the future[.][15]

Elena Kagan, now a Supreme Court Justice, was at that time the Solicitor General. She opined that the Ninth Circuit got it right in *Sprint Telephony*:

> Focusing on the word "may" in Section 253(a), some courts of appeals have suggested that "regulations that may have the effect of prohibiting the provision of telecommunications services are preempted" without regard to their "actual impact" on service providers[.] That suggestion is incorrect, and petitioners make little effort to defend it. As the Ninth Circuit explained below, "Congress' use of the word 'may' works in tandem with the negative modifier '[n]o' to convey the meaning that 'state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service.'" *Thus, the word "may" is properly read in this context not to refer to the possible or conceivable effects of a regulation, but rather to deny permission to States and localities to enforce the types of legal requirements that Section 253(a) forbids. Nothing in the text of Section 253(a) "results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services."*[16]

The Ninth Circuit went on in *Sprint Telephony* to show why 47 U.S.C.A. § 332(c)(7) should control over § 253(a):

> Our present interpretation of § 253(a) is buttressed by our interpretation of the same relevant text in § 332(c)(7)(B)(i)(II)—"prohibit or have the effect of prohibiting." In [MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715 (9th Cir. 2005)], to construe § 332(c)(7)(B)(i)(II), we focused on the actual effects of the city's ordinance, not on what effects the ordinance might possibly allow[.] Indeed, we rejected the plaintiff's argument that, because the city's zoning ordinance granted discretion to the city to reject an application based on vague standards such as "necessity," the ordinance necessarily constituted an effective prohibition. ... Consequently, our interpretation of the "effective prohibition" clause of § 332(c)(7)(B)(i)(II) differed markedly from *Auburn*'s interpretation of the same relevant text in § 253(a)[.]
>
> [...]
>
> Our holding today therefore harmonizes our interpretations of the identical relevant text in §§253(a) and 332(c)(7)(B)(i)(II). Under both, a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunication services is insufficient.[17]

Here, the court brought the conflict out into the open; plaintiffs have to show that there is, in essence, an outright or actual prohibition by the municipal entity in denying service through the ordinance or its enforcement, not one that might possibly occur. In many ways, this is a pragmatic and "bright line" solution to what had become a tangled web of conflicting decisions, particularly because of the *Auburn* case. Courts were put in the untenable position, at the District Court level, of trying to determine whether municipal conduct rose to the level of *potentially* harming the ability of a telecommunications carrier to establish service in an area. This would be, in the best of cases, a dodgy and amorphous standard to try to apply, requiring courts to prognosticate on what might happen in the future.

Nor surprisingly, Sprint then tried to attack the zoning boards as simply another "tool" for a municipality to stop wireless services. The court saw the fallacy in the argument:

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Most of Sprint's arguments focus on the discretion reserved to the zoning board. For instance, Sprint complains that the zoning board must consider a number of "malleable and open-ended concepts" such as community character and aesthetics; it may deny or modify applications for "any other relevant impact of the proposed use"; and it may impose almost any condition that it deems appropriate. A certain level of discretion is involved in evaluating any application for a zoning permit. It is certainly true that a zoning board could exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance—the provision of wireless services and other valid public goals such as safety and aesthetics[.]

The same reasoning applies to Sprint's complaint that the ordinance imposes detailed application requirements and requires public hearings. Although a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application. Sprint has pointed to no requirement that, on its face, demonstrates that Sprint is effectively prohibited from providing wireless services. For example, the Ordinance does not impose an excessively long waiting period that would amount to an effective prohibition. Moreover, if a telecommunications provider believes that the zoning board is in fact using its procedural rules to delay unreasonably an application, or its discretionary authority to deny an application unjustifiably, the Act provides an expedited judicial review process in federal or state court. *See* 47 U.S.C. § 332(c)(7)(B)(ii) & (v).[18]

In ruling in this manner, the Ninth Circuit was following well-established, old and time-tested rules of procedure as well as substantive law in providing a way out for a wireless service provider who felt that it was being unfairly or unreasonably treated by a zoning board. For example, in the State of California an expedited review process under Code of Civil Procedure § 1094.5 permits a litigant to challenge an administrative review board that has made an administrative decision that it believes is invalid:

> 1094.5. Inquiry into validity of administrative order or decision.
>
> a. Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury[.]

47 U.S.C.A. § 332(c)(7)(B)(v) also provides for judicial review:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof ... may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.

In the Ninth Circuit, wireless providers have to go through the zoning process; they are not going to be able to avoid it by claiming that it "might possibly" prevent the establishment of wireless services.

We can now see that the Ninth Circuit has established a framework to protect both the community and the wireless providers. The wireless providers have to go through the zoning process; they are not going to be able to avoid it by claiming that it "might possibly" prevent the establishment of wireless services. Correspondingly, though, municipalities are going to have to fairly and justly enforce their own zoning codes. San Diego's clearly met such requirements:

> We are equally unpersuaded by Sprint's challenges to the substantive requirements of the Ordinance. Sprint has not identified a single requirement that effectively prohibits it from providing wireless services. On the face of the Ordinance, requiring a certain amount of camouflage, modest set-backs, and maintenance of the facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition.[19]

Now, however, the bar has been raised. We now turn to the DAS system, with its correspondingly smaller footprint, but also the new and different problems that it raises by intruding into the public right-of-way and how municipalities and courts are coping with that.

Three decisions came down in 2009 that were of particular note. All were Federal cases and all dealt with public rights-of-way and how ordinances attempting to regulate aesthetics were affected by placing the poles and equipment in public rights-of-way. Two of the three cases were at the trial level at Federal District Courts in the Eastern and Central districts of California, respectively. Probably the more important one, and the better one to start with, is the October 2009 decision in *Sprint Telephony PCS, LLC v. City of Palos Verdes Estates*.[20]

To understand how, in some ways, this case was so peculiarly local is to understand how high a priority that residents of the City of Palos Verdes place on aesthetics in general. By way of example, Rancho Palos Verdes is one of the very few cities in the United States that has its own view protection and view restoration ordinance. The City describes it as follows:

> The citizens of Rancho Palos Verdes passed Proposition M in 1989 that set forth provisions for the preservation of views and the restoration of views impacted by foliage growth. The provisions of Proposition M have been incorporated into Section 17.02.040 of the City's Municipal Code and are administered by the View Restoration Division. In addition, the City adopted Guidelines that explain the procedure for preserving and restoring views. The process proceeds with the goal of reaching mutually acceptable solutions; however, if such resolutions are not reached, formal decisions are made by the City.[21]

The Ninth Circuit's opinion in the *Palos Verdes* opinion describes the community, too:

> The City is a planned community, about a quarter of which consists of public rights-of-way that were designed not only to serve the City's transportation needs, but also to contribute to its aesthetic appeal. In 2002 and 2003, Sprint applied for permits to construct wireless telecommunications facilities ("WCF") in the City's public rights-of-way. The City granted eight permit applications but denied two others, which are at issue in this appeal. One of the proposed WCFs would be constructed on Via Azalea, a narrow residential street, and the other would be constructed on Via Valmonte, one of the four main entrances to the City. [...]
>
> A City ordinance provides that WCF permit applications may be denied for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property." ... Under the ordinance, the City's Public Works Director ... denied Sprint's WCF permit applications, concluding that the proposed WCFs were not in keeping with the City's aesthetics. The City Planning Commission affirmed the Director's decision in a unanimous vote.
>
> Sprint appealed to the City Council ... which received into evidence a written staff report that detailed the potential aesthetic impact of the proposed WCFs and summarized the results of a "drive test," which confirmed that cellular service from Sprint was already available in relevant locations in the City. [...] The Council issued a resolution affirming the denial of Sprint's permit applications. It concluded that a WCF on Via Azalea would disrupt the residential ambience of the neighborhood and that a WCF on Via Valmonte would detract from the natural beauty that was valued at that main entrance to the City.[22]

The underlying issue in the lawsuit had to do with the right of the City to decide aesthetics issues when a telecommunications provider wanted to provide telecommunication services by using a public right-of-way to do it. Cities had previously lost on this point in earlier litigation, and decisions after that time were all over the map:

> While the question of whether California's municipalities have the power to consider aesthetics in deciding whether to grant WCF permit applications has been addressed by us and the California Courts of Appeals, it has not been resolved in a published opinion on which we may rely[.][23]

The *Palos Verdes* court treated 47 U.S.C.A. § 332(c)(7)(B) carefully and went over this argument again:

> One of the limitations that the TCA places upon local governments is that "[a]ny decision... to deny a request to place, construct or

> modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." [Citation omitted.] As we have explained, "The upshot is simple: this Court may not overturn the [City's] decision on 'substantial evidence' grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence." [MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715, 725 (9th Cir. 2005).][24]

Interestingly, the *Palos Verdes* court noted in a footnote just how much the law had changed in the last two years:

> The district court did not have the benefit of our decision in *Metro PCS* when it issued its order granting Sprint summary judgment on its claims under 47 U.S.C. §§ 253 and 332(c)(7)(B)(iii). Indeed, there has been considerable development in this area of the law since the district court resolved Sprint's motion. *See, e.g.*, [Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008); T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987 (9th Cir. 2009).][25]

Sprint came into court claiming that because the proposed improvements were in a right-of-way, § 7901 of the California Public Utilities Code (PUC) prohibited any local control of a decision based on aesthetics. In doing so, it relied on the case of *Sprint PCS Assets, LLC v. City of La Cañada Flintridge*,[26] in which the Ninth Circuit held that § 7901 preempted an ordinance that allowed a city to deny permits to install telecommunications facilities based solely on aesthetics.

The *Palos Verdes* court, though, essentially ignored the *La Cañada Flintridge* holding and reconciled the City of Palos Verdes' ordinance with the State law that Sprint was asserting overrode local land use authority:

> The City's consideration of aesthetics in denying Sprint's WCF permit applications comports with PUC § 7901, which provides telecommunications companies with the right to construct WCFs "in such manner and at such points as not to incommode the public use of the road or highway." ... To "incommode" the public use is to "subject [it] to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience" or "[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.)." 7 The Oxford English Dictionary 806 (2d ed. 1989); *see also* Webster's New Collegiate Dictionary 610 (9th ed. 1983). The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a WCF, and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying and less distressing than the latter. After all, travel is often as much about the journey as it is about the destination.[27]

To understand how dramatic a departure this harmonization of the state law and the local ordinance was from the *La Cañada Flintridge* holding, one has to know how polar the *La Cañada Flintridge* opinion was on this point:

> Section 7901 gives telephone companies broad authority to construct telephone lines and other fixtures "in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." By the plain text of the statute, the only substantive restriction on telephone companies is that they may not "incommode the public use" of roads. It is possible that extremely severe aesthetic objections could conceivably incommode the use of the roads. ... An extraordinarily unattractive wireless antenna might, for example, cause such visual blight that motorists are uncomfortable using the roads. Counsel for the City posited, during oral argument, that an unattractive wireless structure could cause "discomfort."
>
> However, the most natural reading of § 7901 grants broad authority to telephone companies to install necessary wires and fixtures, so long as they do not interfere with public use of the roads. The text focuses on the *function* of the road—its "use," not its enjoyment. Based solely on § 7901, it is unlikely that local authorities could deny permits based on aesthetics without an independent justification routed in interference with the function of the road.[28]

The Ninth Circuit apparently later decided not to publish the opinion, and that threw the state of the law into greater chaos, but gave the *Palos Verdes* court the ability to settle the law without, in a sense, overruling itself.

On its face, the collision of the two opinions couldn't be more stark: the *La Cañada Flintridge* opinion is saying that, basically, if you can drive down the road and not hit the pole, and its mass, bulk and scale are not such a huge interference that you cannot use the roads, then Public Utilities Code § 7901 trumps any local land use decision based on aesthetics. *Palos Verdes* is saying the opposite: It has defined the word "incommode" in carefully laid out language, to make clear that the word "incommode" takes into account aesthetic issues.

It is all the more interesting to note how apparently sensitive the Circuit Judge writing the *Palos Verdes* opinion was on the issue of aesthetics. She went into detail about how aesthetics plays a part in rights-of-way:

> The absence of a conflict between the City's consideration of aesthetics and PUC § 7901 becomes even more apparent when one recognizes that the "public use" of the rights-of-way is not limited to travel. It is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive and aesthetic functions. See Ray Gindroz, *City Life and New Urbanism*, 29 Fordham Urban Law Journal 1419, 1428 (2002) ("A primary task of all urban architecture and landscape design is the physical definition of streets and public spaces as places of shared use."); Kevin Lynch, The Image of the City 4, (1960) ("A vivid and integrated physical setting, capable of producing a sharp image, plays a social role as well. It can furnish the raw material for the symbols and collective memories of group communication."); Camillo Sitte, City Planning According to Artistic Principles 111-12 (Rudolph Wittkower ed., Random House 1965) (1889) ("One must keep in mind that city planning in particular must allow full and complete participation to art, because it is this type of artistic endeavor, above all, that affects formatively every day and every hour of the great mass of the population..."). As Congress and the California Legislature have recognized, the "public use" of the roads might also encompass recreational functions. *See, e.g.*, Cal. Pub. Util. Code § 320 (burying of power lines along scenic highways); 23 U.S.C. § 131(a) (regulation of billboards near highways necessary "to promote ... recreational value of public travel ... and to preserve natural beauty.")
>
> These urban planning principles are applied in the City, where the public rights-of-way are the visual fabric from which neighborhoods are made. For example, the City's staff report explains that Via Valmonte, which is adorned with an historic stone wall and borders a park, is "cherished for its rural character, and valued for its natural, unspoiled appearance, rich with native vegetation." Meanwhile, Via Azalea is described as "an attractive streetscape" that creates a residential ambience. That the "public use" of these rights-of-way encompasses more than just transit is perhaps most apparent from residents' letters to the Director, which explained that they "moved to Palos Verdes for its [a]esthetics" and that they "count on the City to protect [its] unique beauty with the abundance of trees, the absence of sidewalks, even the lack of street lighting."[29]

Sprint also brought up the companion section of the state Public Utilities Code, § 7901.1. That statute provides that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." As the *Palos Verdes* court put it:

> That provision was added to the PUC in 1995 to "bolster the cities' abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone corporations' statewide franchise."[30]

Although Sprint argued that § 7901.1 barred the City from invoking aesthetic concerns in denying WCF construction permits, the *Palos Verdes* court disagreed:

> Aesthetic regulations are "time, place, and manner" regulations, and the California Legislature's use of the phrase "are accessed" in PUC § 7901.1 does not change that conclusion in this context. Sprint argues that the "time, place and manner" in which the rights-of-way "are accessed" can refer only to when, where, and how telecommunications service providers gain entry to the public rights-of-way. We do not disagree. However, a company can "access" a city's rights-of-way in both aesthetically benign and aesthetically offensive ways. It is certainly within a city's authority to permit the former and not the latter.[31]

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The *Palos Verdes* court treated two other issues in its opinion: the specificity of the ordinance itself and this idea of an "effective prohibition" of service. Reaching back to an earlier Ninth Circuit decision originating in the State of Washington, *T-Mobile USA, Inc. v. City of Anacortes*,[32] the court wanted to make sure that the ordinance contained enough specifics as to aesthetic considerations to allow it to be objectively and reasonably applied:

> Our interpretation of California law is consistent with the outcome in *City of Anacortes*, in which we rejected a § 332(c)(7)(B)(iii) challenge to a city's denial of a WCF permit application that was based on many of the same aesthetic considerations at issue here. *City of Anacortes*, 572 F.3d at 994-95. There, the city determined that the proposed WCF would have "a commercial appearance and would detract from the residential character and appearance of the surrounding neighborhood"; that it "would not be compatible with the character and appearance of the existing development"; and that it would "negatively impact the views" of residents. [Citation omitted.] We noted that the city ordinance governing permit applications required the city to consider such factors as the height of the tower and its proximity to residential structures, the nature of uses of nearby properties, the surrounding topography, and the surrounding tree coverage and foliage. ... What was implicit in our decision in *City of Anacortes* we make explicit now: California law does not prohibit local governments from taking into account aesthetic considerations in deciding whether to permit the development of WCFs within their jurisdictions.[33]

The second issue, the idea of "effective prohibition," grows out of this statute:

> The TCA provides that a locality's denial of a WCF permit application "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). "[A] locality can run afoul of the TCA's 'effective prohibition' clause if it prevents a wireless provider from closing a 'significant gap' in service coverage." [Citation omitted.] The "effective prohibition" inquiry "involves a two-pronged analysis requiring (1) the showing of a 'significant gap' in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations." [Citation omitted.]
>
> [...]
>
> "'[S]ignificant gap' determinations are extremely fact-specific inquiries that defy any bright-line legal rule." [Citation omitted.] Yet Sprint and the district court take a bare-bones approach to this inquiry. The district court simply declared, as a matter of fact and fiat, that there was "a significant gap" in Sprint's coverage in the City. Sprint defends this factual finding on appeal, arguing that its presentation of radio frequency propagation maps was sufficient to establish a "significant gap" in coverage. We disagree.
>
> Sprint's documentation stated that the proposed WCFs would provide "good coverage" for .2 to .4 miles in various directions. However, it remains far from clear whether these estimates were relative to the coverage available from existing WCFs or to the coverage that would be available if there were no WCFs at all[.] In any event, that there was a "gap" in coverage is certainly not sufficient to establish that there was a "significant gap" in coverage. See [MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715, 733 n. 10 (9th Cir. 2005)] ("the relevant service gap must be truly 'significant' ...'"); id. at 733 ("The TCA does not guarantee wireless service provides coverage free of small 'dead spots'...").[34]

New cases indicate that, contrary to prior law, municipalities do have significant authority to regulate aesthetics relating to the installation of wireless infrastructure.

So where does this leave us? We have a series of new cases that indicate that, contrary to prior law, municipalities do have significant authority and control to regulate their own aesthetics relating to the installation of wireless infrastructure. How are they being applied? Given the new technology of DAS systems, are the courts still supporting the application of aesthetics criteria, when now the infrastructure is smaller in scale and bulk and almost exclusively put in the public's right-of-way?

The answer, apparently, is an unqualified yes. Two decisions in particular coming down in 2009 and 2010, linked in tandem, both at the trial level in the Federal courts, and both arising in California, discuss this point. They are *NewPath Networks, LLC v. City of Davis*[35] and *NewPath Networks, LLC v. City of Irvine, California*.[36] These cases both involved DAS system installations, and both involved installations in rights-of-way. In the *Davis* case, the court went into some detail as to the origination of a DAS system and describing the infrastructure that would be used to implement it:

> A DAS is a network typically comprised of "small, low-power antennas," referred to as "nodes," connected to a "central hub" by "fiber optic cable." ... Each node is located on or in light standards, traffic signals or other vertical structures[.] ... NewPath's DAS receives and transmits the wireless telephone and data communication signals of its Customer Carriers[.] ... NewPath describes its DAS as a "dumb pipe," which its Customer Carriers can use to provide wireless communications to their subscribers; NewPath thus characterizes itself as a "carrier's carrier." ...
>
> NewPath's proposed DAS calls for the installation of twenty-four wireless antenna facilities ("nodes") within the City. ... NewPath would construct seventeen wooden or metal poles, approximately forty-two feet high, to host nodes, while the other nodes would be placed on existing telephone or electric poles[.] ... Each node would be connected to the other nodes and a central hub by fiber optic cable.[37]

The *Irvine* case was similar, but in that case NewPath took a more aggressive tack. NewPath in the *Irvine* case challenged the ordinance on its face rather than how it was applied. NewPath obtained a notice to proceed from the California Public Utilities Commission and then claimed that, because the Commission had given consent, *the City's authority to regulate the installation on any grounds, not just aesthetics, was superseded.*

In essence, both the *Irvine* and the *Davis* court disagreed with this argument, finding that under both the *Anacortes* case and the *Palos Verdes* case, the cities did have that authority ("Under *Palos Verdes Estates*, it is proper to deny a WCF application on aesthetic grounds."[38]).

But the *Irvine* court went further; it did specific factual analysis, too:

> [U]nder *Anacortes* and *Palos Verdes Estates*, it is clear that Irvine had substantial evidence for its denial of the [conditional use permit.] Irvine had more than enough evidence to determine that the NewPath DAS project would have an adverse aesthetic effect on Turtle Rock. Irvine received visual simulations from NewPath of the proposed DAS nodes and attendant utility boxes and vaults....the Irvine city staff also prepared a report detailing the aesthetic impacts of the DAS project, including visual simulations of each of the 23 proposed DAS nodes... Irvine received substantial public comment at three public hearings during which many residents complained about the aesthetic impacts of the DAS project... It also received numerous letters and emails criticizing the aesthetics of the DAS project.
>
> *Irvine also had substantial evidence for its determination that the NewPath DAS project would adversely affect property values. It received input from numerous residents that the nodes would affect Turtle Rock's desirability and decrease property values, including a petition signed by 666 residents. Several residents stated that sales of homes had either been jeopardized or lost.*[39]

Courts are now applying the *Palos Verdes* and *Sprint Telephony* criteria: the carriers are being told that they are going to have to comply with aesthetic criteria. To catch up, a number of municipalities are rewriting their own ordinances.

In particular, the City of Norwalk, California enacted its Interim Ordinance No. 10-1627U on March 2, 2010, imposing a moratorium on approval of permits for the installation of wireless facilities.[40]

Interestingly, other small towns such as Catskill, New York, are applying both aesthetic criteria and what they believe are public safety criteria, perhaps in contravention of each other. In a June 19, 2009, newspaper article in *The Daily Mail* of Catskill, New York, emergency services volunteers complained that lack of service could seriously interfere with their ability to respond to emergency situations:

> "We need cell service in Durham because we're dealing with life-and-death situations," EMS Vice President Bob Haller said. "Right now,

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cell phone contact is hit-and-miss. That has an impact on the medics, REMO and paramedics. Without reliable cell service our ability to protect the health of Durham's residents is impaired."[41]

Others in the Durham town board meeting that was described in the article talked about health issues and electromagnetic radiation. The *Washington Post* did a very similar article on a very similar meeting. In its article of October 2, 2010, the *Post* detailed a meeting in a suburban Fairfax County, Virginia Council of PTAs' discussion about placing cell phone towers at schools:

> Schools tend to be in locations that cellphone companies find desirable (Longfellow is in the middle of a cellular "dead zone" in the Falls Church area) and often have existing structures[.] ... Parents have started groups such as Gainesville-based Moms for Safe Wireless and Falls Church-based Protect Schools. At Longfellow, the proposition has agitated a group of passionate, educated parents who have collected a mountain of information—much of it inconclusive—on non-ionizing radiation. ... Even though most public health agencies agree that the radio-frequency radiation exposure from the towers is significantly lower than exposure from cellphones, the infrastructure's long-term effect has caused concern. "They tell you it's absolutely safe, and safe within the FCC standard ... but it's impossible to gauge the safety because Milestone doesn't provide sufficient data to determine the total RF radiation that will be generated by the specific antenna array at Longfellow," said Neil Ende, a parent of a Longfellow student. On Monday, a team of Milestone employees tried to explain the basics of wireless infrastructure to parents, some of whom resisted their efforts. Few middle school PTAs boast a more impressive pool of professional expertise. "I don't need you to explain this to me; I'm an electrical engineer," one parent said. "I'm a medical oncologist at Georgetown," another man said, by way of introduction. "I'm a telecommunications attorney," said another. "I just spoke with one of the world's foremost radiation experts in Salzburg, Austria," said Karl Polzer, co-founder of Protect Schools, who raised concerns about the effect of long-term radiation exposure.[42]

Lake Placid, New York, is having the same concerns;[43] as are Townsend, Tennessee;[44] Panama City, Florida;[45] San Jose, California;[46] and Merrick, New York.[47]

Some towns have gone as far as to enact distance limitations from residential areas, a principle that most commentators believe may inspire a legal challenge. That doesn't dissuade the residents:

> The Hempstead Town Board unanimously signed off on legislation Tuesday morning that bans any new cell towers or antennas within 1,500 feet of homes or schools. During a public hearing on the new ordinance, speakers on both sides of the debate—wireless companies arguing that the ordinance was too restrictive and residents saying it needed to address further issues—urged the board to delay a vote on the new regulations. Town Supervisor Kate Murray said, however, that the time to act was now.
>
> "The bottom line is we know that this is a very tough piece of legislation, a great piece of protection for our residents," Murray said, later adding that although the law could be amended down the road, "the feeling of the board was that we had to pass legislation today because it is entirely too important to let it continue on."
>
> The ordinance also states that no new cell towers or antennas can be placed within 1,500 feet of daycare centers or houses of worship.[48]

Grass-roots entities are also springing up to oppose the installations in public fora. The city of Burbank, California has been confronted by a citizens' group called Burbank ACTION (Against Cell Towers in Our Neighborhood), which has hosted a website and collected news articles, prepared petitions and is attending City meetings en masse regarding the content and function of wireless ordinances.[49]

Perhaps a viewpoint, though, that puts the conflict into perspective is one rendered by UCLA law professor Jerry Kang, who specializes in technology and communications policy. Quoted recently in an Orange Coast *Daily Pilot* news story, and asked about the DAS technology, he indicated: "You have technology that evolves really fast, and you've got existing law that's designed for the tall cell towers. ... Entrepreneurs push the edges, and then the law comes in and says, wait, this is not what we expected."[50]

As demand increases due to the proliferation of smart phones and more complex, more data-hungry devices, so will the profit motive for installation and maintenance of Distributed Antenna Systems nodes.

The profit motive for the installation and maintenance of these DAS "nodes" and the infrastructure that supports them isn't going to go away and, as demand increases due to the proliferation of smart phones and more complex, more data-hungry devices, so will the profit motive. The City of Scottsdale, Arizona is currently considering a proposal by NewPath Networks to build a network of 287 DAS nodes, roughly spaced every quarter-mile through central and northern portions of Scottsdale. The sites are going to be connected by 120 to 150 miles of fiber optic cable. NewPath Networks has already received 220 approvals prior to this submission; the capital investment that is needed to put in fiber optic cable and do the necessary trenching, undergrounding, and acquisition of rights-of-way to bury the cable will be sufficiently costly that NewPath, or any potential infrastructure provider, will have to know the limits and scope of what it can and can't do in attempting to install and maintain these antennae.[51] In some cases, NewPath's competitors have ignored or flouted approval requirements, thinking that they can profit sufficiently to justify the risk of regulatory denial. This has happened, for example, in California:

> NextG ran afoul of the PUC in 2009 when it dug into the public right-of-way without a full certificate, and the Commission fined it $200,000. Since then, NextG has obtained the necessary PUC approvals to build in the rights-of-way. ... NextG rushed to install the equipment by Mallett's Laguna Beach house because the permitting process was taking too long and a competitor has already installed nodes, a company representative said at a planning commission hearing. "Just the idea that they came in without permission," Mallett said. "It was just business for them. They didn't care about how it affected us."[52]

One of the neighbors affected by NextG's conduct sums up succinctly the wellspring of anger and frustration that has developed as a result of the proliferation of these networks and the citizen and municipal opposition being brought to bear as a result of it. Rose Mallett, one of the neighbors affected by NextG and its installation, also became angry at NextG's conduct:

> NextG also installed an antenna and equipment near Rose Mallett's Laguna Beach home. Her front porch overlooks a row of homes and, past the roofs and under utility wires, you can clearly see a stretch of the Pacific. That was until crews hung a black box from a low utility wire. As Mallett, 60, rocked in her hammock, she couldn't get it out of her line of sight. Enraged, she called the city. What she found out surprised her even more. The company installed it without a city permit.[53]

The same news article quoting Rose Mallett quoted an FCC report indicating that North American Mobile customers will use 40 times more data.

Cities and their citizens will now have to be very vigilant and very vocal to prevent aesthetic intrusions; the profit motive is so great and the number of players in the arena so large that very little will stand in the way of an explosion and proliferation of antennae, nodes, and fiber optic cable. How the landscape will look across the United States in the future will be directly affected by this tug of war; it will be easy to put up these towers but hard to take them down.

NOTES

1. Amici curiae brief of NextG Networks of California, Inc. and the DAS Forum (2009 WL 99138), filed in support of petition for certiorari filed in Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008), cert. denied, 129 S. Ct. 2860, 174 L. Ed. 2d 576 (2009) (emphasis added).
2. The DAS Forum—About Us: Who We Are; at www.thedasforum.org/about/who.php.
3. http://www.thedasforum.org/events/DASPelicanHill.html.
4. http://en.wikipedia.org/wiki/moore's_law.
5. Amici Curiae brief of NextG Networks and the DAS Forum, supra n. 1 (emphasis added).
6. Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008), cert. denied, 129 S. Ct. 2860, 174 L. Ed. 2d 576 (2009).
7. San Diego County Ordinance No. 9549, § 1, quoted in *Sprint Telephony*, supra n. 6, 543 F.3d at 574.
8. *Sprint Telephony*, supra n. 6, 543 F.3d at 575.
9. *Sprint Telephony*, supra n. 6, 543 F.3d at 575.
10. HR Rep No. 104-458, § 704, at 207-08 (1996), cited in *Sprint Telephony*, supra n. 6, 543 F.3d at 576.

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11. *Sprint Telephony*, supra n. 6, 543 F.3d at 576 (internal quotation marks omitted).
12. City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001) (overruled by, Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008)).
13. Level 3 Communications, L.L.C. v. City of St. Louis, Mo., 477 F.3d 528 (8th Cir. 2007).
14. *Sprint Telephony*, supra n. 6, 543 F.3d at 578.
15. Brief for the United States as Amicus Curiae, Level 3 Communications, LLC, Petitioner, v. City of St. Louis, Missouri and Sprint Telephony PCS, LP, Petitioner v. San Diego County, California et al, United States Supreme Court cases numbers 08-626 and 08-759, 2009 WL 1497821, p. 2.
16. Brief for the United States as Amicus Curiae, supra n. 15 at p. 6 (emphasis added).
17. *Sprint Telephony*, supra n. 6, 543 F.3d at 578-579 (emphasis in original).
18. *Sprint Telephony*, supra n. 6, 543 F. 3d at 579-580.
19. *Sprint Telephony*, supra n. 6, 543 F. 3d at 580.
20. Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates, 583 F.3d 716 (9th Cir. 2009).
21. City of Rancho Palos Verdes, View Restoration Summary at www.palosverdes.com/rpv/planning/vrestoration/index.cfm.
22. *Sprint PCS Assets*, supra n. 20, 583 F.3d at 719-20.
23. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 721 n. 2.
24. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 720.
25. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 721 n. 1.
26. Sprint PCS Assets, L.L.C. v. City of La Cañada Flintridge, 182 Fed. Appx. 688 (9th Cir. 2006).
27. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 723.
28. *La Cañada Flintridge*, supra n. 26, 182 Fed. Appx. at 690-91.
29. *Sprint PCS Assets*, supra n. 20, 583 F.3d at 723-724.
30. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 724.
31. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 724-25.
32. T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987 (9th Cir. 2009).
33. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 725.
34. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 727.
35. NewPath Networks, LLC v. City of Davis, 2010 US DIST LEXIS 40043 (E.D. Cal. 2010).
36. NewPath Networks, LLC v. City of Irvine, California, 2009 US DIST LEXIS 126178 (C.D. Cal. 2009).
37. *City of Davis*, supra n. 35, 2010 US DIST LEXIS 40043 at 8-9.
38. *City of Irvine*, supra n. 36, 2009 US DIST LEXIS 126178 at 54.
39. *City of Irvine*, supra n. 36, 2009 US DIST LEXIS 126178 at 55-56 (emphasis added).
40. See, e.g., City Council Agenda Report –City of Norwalk from Ernie V. Garcia, City Manager to Honorable City Council at www.ci.norwalk.ca.us/pdf/agendas/13%20-%20urgency%20ord%20-%20wireless%20antennas%2003-02-10.pdf.
41. Cell tower foes argue for alternate sites; Hilary Hawke, *The Daily Mail*, June 19, 2009 at www.thedailymail.net/articles/2009/06/20/news/news3.prt.
42. www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100107286_pf.html.
43. See, http://pressrepublican.com/0100_news/x877133006/cupola-cell-tower-needs-local-permit.
44. www.thedailytimes.com/article/20091115/news/311159963.
45. www.newsherald.com/common/printer/view.php?db=newsherald&id=87498.
46. "Our concerns have always been that a fourth tower is too many, the height is too high, and there's no adequate screening to have the development blend in with the community," neighbor Chris Hyrne said."
47. www.nytimes.com/2010/08/29/realestate/29lizo.html?_r=1&pagewanted=print ("Tina Canaris, an associate broker and a co-owner of RE/MAX Hearthstone in Merrick, has a $999,000 listing for a high ranch on the water in South Merrick, one of a handful of homes on the block on the market. But her listing has what some consider a disadvantage: a cell antenna poking from the top of a telephone pole at the front of the 65-by-100-foot lot. .... She said cell antennas and towers near homes affected property values, adding, 'You can see a buyer's dismay over the sight of a cell tower near a home just by their expression, even if they don't say anything.'")
48. *Celled-Out: Hempstead Town Board Adopts Strict Regulations on New Wireless Equipment*, by Ryan Bonner; Merrick Patch; Merrick.patch.com/articles/celled-out-hempstead-town-board-adopts-strict-regulations-on-new-cell-towers.
49. See, e.g., http://sites.google.com/site/nocelltowerinourneighborhood.
50. Orange Coast *Daily Pilot*; "Cell towers get poor reception from community" by Mike Reicher; www.dailypilot.com/news/tn-dpt-0725-cell-20100724,0,3681468,print,story.
51. See, e.g., www.scottsdaleaz.gov/projects/interest/newpath_networks.asp.
52. "Cell towers get poor reception from community," Orange Coast *Daily Pilot*; Mike Reicher, July 23, 2010 at www.dailypilot.com/news/tn-dpt-0725-cell-20100724,0,2872935.story.
53. "Cell towers get poor reception from community," supra n. 52.

OF RELATED INTEREST

Discussion of matters related to the subject of the above article can be found in:

Am. Jur. 2d, Zoning and Planning §§391, 895

Salkin, American Law of Zoning §§25:1 et seq.

Zeigler, Rathkopf's The Law of Zoning and Planning §§79:18 to 79:24

Kmiec and Turner, Zoning and Planning Deskbook § 3:5

See also Foster, The Better Part of Valor Is Co-Location: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities under the Telecommunications Act of 1996, 42 Urb. Law. 595 (Summer 2010)

RECENT CASES

Ninth Circuit holds city's ban on tattoo parlors violated First Amendment.

The municipal code of the City of Hermosa Beach, California effectively banned tattoo parlors from the City by not including them in a list of allowed commercial uses. Johnny Anderson sued the City in federal court under 42 U.S.C.A. § 1983, alleging that the City's ban on tattoo parlors was facially unconstitutional under the First and Fourteenth Amendments. The district court granted summary judgment to the City, holding that the act of tattooing was not protected under the First Amendment and that, in view of the health risks inherent in operating tattoo parlors, the City had a rational basis for prohibiting them.

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed. The court noted that tattooing is purely expressive activity, then it is entitled to full First Amendment protection, subject only to reasonable "time, place, or manner" restrictions. On the other hand, if tattooing is merely conduct that contains an expressive element, it can be restricted under the test set forth in *U. S. v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). In its analysis, the court examined tattoos themselves, the process of tattooing, and the business of tattooing.

There seems to be, said the court, little dispute that a tattoo itself is pure First Amendment "speech." The fact that a tattoo is engrafted onto a person's skin rather than drawn on paper has no significance for First Amendment purposes.

The court then considered whether the process of tattooing is purely expressive activity, and held that it is. The court noted that neither the U.S. Supreme Court nor the Ninth Circuit has ever drawn a distinction, for First Amendment purposes, between the process of creating a form of pure speech (such as writing or painting) and the product of such processes. As with writing or painting, the tattooing process is inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to First Amendment protection. The fact that the customer ultimately controls what tattoo is created makes no difference, said the court, because the tattooist applies his creative talents as well.

Finally, the court held that even the business of tattooing qualifies as purely expressive activity. The court cited various cases in which the sales of paintings, or the giving of speeches for compensation, were held to be protected speech.

The court then turned to whether the City's ban withstood scrutiny as a reasonable "time, place or manner" restriction on speech. The court noted that the City's ban did not involve the content of the regulated speech. However, said the court, the ban was substantially broader than necessary to further the City's concerns with the health and safety concerns implicated by tattooing. The contention by the City that it did not have the resources to adequately monitor tattoo parlors did not justify an outright ban, said the court, because the provision of such resources was within the City's control; a total ban cannot be imposed on protected First Amendment Activity simply because of the government's failure to provide the resources it thinks are necessary to regulate it.

The court went on to say that even if the City's regulation were narrowly tailored to serve its health and safety interest, it would fail because it did not leave open ample alternative channels for communication of the information imparted by a tattoo. Temporary tattoos, or the wearing of t-shirts carrying a message, are not like a tattoo, said the court. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010).

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The Better Part of Valor Is Co-Location: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities Under the Telecommunications Act of 1996

Robert B. Foster*

SECTION 704 OF THE TELECOMMUNICATIONS ACT OF 1996 ("TCA") gives courts the authority to review a local zoning authority's denial of an application for a wireless telephone tower or facility.[1] Since 1996, wireless telephone providers have brought actions under this Act to challenge local authorities' denials of individual applications for the siting of a wireless facility. Faced with these challenges, courts have worked to harmonize Congress's "two sometimes contradictory purposes" in enacting the Act: to promote competition and reduce regulation in order to accelerate the deployment of telecommunications technology, while also preserving state and local control over land use matters.[2] In 2009, courts continued to struggle with these competing objects, especially in the context of proposals to co-locate facilities on existing towers. Courts addressed what weight should be given to aesthetic objections to wireless towers, whether denials of applications to co-locate on existing towers constituted unreasonable discrimination, and what constituted a gap in coverage to support a claim for prohibition of service. This last issue, on which circuits split, was resolved when the Federal Communications Commission (FCC) issued a declaratory ruling that a denial based solely because other providers already served the area would, indeed, constitute the effective prohibition of service.[3] The FCC's declar-

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1. *See* 47 U.S.C. § 332(c)(7) (2010).

2. T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 991-92 (9th Cir. 2009); *see also* U.S. Cellular Corp. v. City of Wichita Falls, 364 F.3d 250, 253 (5th Cir. 2004); ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002).

3. Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), 24 F.C.C.R. 13994, 14016 (2009) [hereinafter *Declaratory Ruling*].

atory ruling resolved another issue that had bedeviled courts by setting a time limit for consideration of applications, beyond which providers would be permitted to claim under the TCA that the municipality had failed to act within a reasonable period of time.[4]

I. The Telecommunications Act

Section 332(c)(7) of the TCA does not completely preempt local zoning authority. Rather, it places certain restrictions on the authority of local bodies to regulate the zoning of telecommunications service facilities. It provides that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless services facilities."[5] The section goes on to limit a municipality's power to regulate tower siting with three substantive and two procedural limitations. The first substantive restriction bars localities from "unreasonably discriminat[ing] among providers of functionally equivalent services."[6] The second substantive restriction complements the first: "[t]he regulation of the placement, construction and modification of personal wireless service facilities . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[7] The third substantive restriction bars localities from regulating "on the basis of environmental effects of radio frequency emissions to the extent that such facilities comply with [FCC] regulations."[8]

Procedurally, section 332(c)(7) requires that an applicant's request be heard within a reasonable period of time and any permit denial by a locality "be in writing and supported by substantial evidence contained in a written record."[9] Also, any person adversely affected by a final action or failure to act on a siting application may bring an action in a court of competent jurisdiction, which must be considered on an expedited basis.[10]

4. *Id.* at 14004–05; *see* 47 U.S.C. § 332(c)(7)(B)(ii).
5. 47 U.S.C. § 332(c)(7)(A).
6. *Id.* § 332(c)(7)(B)(i)(I).
7. *Id.* § 332(c)(7)(B)(i)(II).
8. *Id.* § 332(c)(7)(B)(iv).
9. *Id.* §§ 332(c)(7)(B)(ii)-(iii).
10. 47 U.S.C. § 332(c)(7)(B)(v).

II. Unreasonable Discrimination: Local Regulation of Wireless Services Shall Not Unreasonably Discriminate Among Providers of Functionally Equivalent Services

It is difficult to successfully claim unreasonable discrimination under the TCA, as courts emphasize that the TCA bars only *unreasonable* discrimination, thus contemplating some discrimination among providers, so long as it is based on generally applicable zoning requirements.[11] In 2009, however, two courts found that when a provider is denied permission to co-locate on an existing tower which already has other providers' antennae, it has been discriminated against unreasonably. In *Omnipoint Communications, Inc. v. Town of LaGrange*,[12] Omnipoint decided, based on (a) the town's stated goals to minimize towers and mandate co-location on existing towers and its requirement to exhaust co-location before seeking to construct a new tower, (b) the requirement of a variance for a new tower, and (c) the fact that co-location would fill its coverage gap, that "the better part of valor was to table" its application for a new tower and seek a permit to co-locate on an existing tower.[13] The town conducted a lengthy review process, during which it suggested that Omnipoint seek a new tower, and then denied Omnipoint's variance request for co-location.[14] The reviewing court concluded that the existing service on the proposed co-locating tower was functionally equivalent to Omnipoint's service, and that the town's discrimination against Omnipoint was unreasonable, "creat[ing] an unlawful competitive advantage in favor of another wireless provider."[15]

A federal district court in Massachusetts reached a similar conclusion in *New Cingular Wireless PCS LLC v. Town of Stow*.[16] New Cingular wished to co-locate on an antenna on top of an existing smokestack, on which two other providers had already obtained approval for and constructed antennae.[17] The town's planning board denied New Cingular's application because its antenna would extend beyond the height of the smokestack and that its proposed camouflage—a fiberglass extension

11. *See, e.g.*, MetroPCS, Inc. v. City & County of S.F., 400 F.3d 715, 727 (9th Cir. 2005).
12. 658 F. Supp. 2d 539 (S.D.N.Y. 2009).
13. *Id.* at 547.
14. *Id.* at 547-61.
15. *Id.* at 561.
16. No. 06-10659-GAO, 2009 U.S. Dist. LEXIS 58837 (D. Mass. July 9, 2009).
17. *Id.* at *1-*4.

simulating a brick façade—would not match the existing brick.[18] The court held that New Cingular's co-location proposal need not be identical to the other existing facilities, but only "so similar to any existing, already permitted facility or facilities that it is unreasonable for a town [to] treat it differently."[19] The two reasons that the New Cingular facility might be different from the two existing antennae—that it would be 10 feet higher and its fiberglass faux brick would look different—did not support discriminating against New Cingular. The town did not adequately explain why it would hold New Cingular to a height restriction that did not apply to the other two carriers, and it was unfair to request that New Cingular camouflage the antenna and then cite that camouflage as a reason for denial. Such an "end-run around the TCA antidiscrimination provision cannot be permitted."[20]

III. Effective Prohibition: Local Regulation of Wireless Services Shall Not Prohibit or Have the Effect of Prohibiting the Provision of Personal Wireless Services

After the Ninth Circuit's 2008 decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, which held that the provisions of section 253(a) of the TCA were to be interpreted consistently with the effective prohibition provision of section 332(c)(7)(B)(i)(II),[21] providers and municipalities returned to the problem of just what constitutes an "effective prohibition." As the First Circuit noted in *Omnipoint Holdings, Inc. v. City of Cranston*,[22] by 2009 the circuit courts had at least three different interpretations of what constituted the prohibition of personal wireless services in violation of the TCA.

The Fourth Circuit maintained that only a general ban on all wireless facilities by a town could constitute prohibition of service.[23] Courts in other circuits held that an individual denial could be deemed an effective prohibition of wireless service in a particular area, by applying a

18. *Id.* at *5-*9.
19. *Id.* at *14.
20. *Id.* at *19-*20. In the section of its decision concerning substantial evidence, the court also noted that aesthetic objections to the faux brick fiberglass were unsupported, since "the smokestack is already unsightly." *Id.* at *14.
21. 543 F.3d 571, 578-79 (9th Cir. 2008) *rev'g en banc*, 490 F.3d 700 (9th Cir. 2007).
22. 586 F.3d 38 (1st Cir. 2009).
23. USCOC of Va. RSA #3, Inc. v. Montgomery County Bd. of Supervisors, 343 F.3d 262, 268 (4th Cir. 2003); AT&T Wireless PCS, Inc. v. City Council of Va. Beach, 155 F.3d 423, 428 (4th Cir. 1998).

two-pronged test: (1) whether a significant gap in coverage exists in an area and (2) whether alternatives to the carrier's proposed solution to the gap mean that there is no effective prohibition.[24] The differences among the other circuits arose in how each interpreted these two prongs. With respect to the first prong, the gap analysis, the Third Circuit held that a gap in service means a gap in service generally, *i.e.*, if any provider already serves the area, even if it is not the provider seeking the facility, then there is no gap.[25] Other circuits, such as the First, Seventh, and Ninth Circuits, held that a significant gap exists if the provider has a gap in its own service, whether or not any other provider provides service to the same gap.[26] The Second Circuit, in the meantime, had a split among its own district courts. Its decision in *Sprint Spectrum, L.P. v. Willoth*[27] was read by some of its district courts as requiring a gap in service generally and by others as requiring only a showing of a gap in the applying provider's service.[28]

This circuit split was resolved by the Federal Communications Commission in the *Declaratory Ruling*. The FCC issued the *Declaratory Ruling* in response to a petition from CTIA—The Wireless Association.[29] The FCC found that the circuit split on what constitutes a gap in coverage created a controversy "that is appropriately resolved by declaratory ruling," because this circuit split indicated that the effective prohibition provision was ambiguous.[30] Exercising its rulemaking authority, the FCC concluded that:

> a State or local government that denies an application for personal wireless service facilities siting solely because "one or more carriers serve a given geographic mar-

24. *City of Cranston*, 586 F.3d at 48.

25. Nextel West Corp. v. Unity Twp., 282 F.3d 257, 265 (3d Cir. 2002); APT Pittsburgh L.P. v. Penn Twp., 196 F.3d 469, 478-79 (3d Cir. 1999); *see City of Cranston*, 586 F.3d at 49.

26. *See City of Cranston*, 586 F.3d at 49; T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 995 n.9 (9th Cir. 2009) (citing MetroPCS, Inc. v. City & County of S.F., 400 F.3d 715, 733 (9th Cir. 2005)); Voicestream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818, 834-35 (7th Cir. 2003).

27. 176 F.3d 630 (2d Cir. 1999).

28. *See, e.g.*, T-Mobile Ne. LLC v. Town of Ramapo, No. 08 Civ. 2419, 2009 U.S. Dist. LEXIS 89439, at *31-*32 (S.D.N.Y. Sept. 28, 2009) (finding relevant coverage gap is gap in applying provider's coverage); SiteTech Group Ltd. v. Bd. of Zoning Appeals, 140 F. Supp. 2d 255, 264 (E.D.N.Y. 2001) (finding relevant coverage gap is absence of service by any provider).

29. *Declaratory Ruling*, 24 F.C.C.R. 13994, 13995, 14016 (2009).

30. *Id.* at 14016 & n.176; *see* 47 C.F.R. § 1.2; Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

> ket" has engaged in unlawful regulation that "prohibits or ha[s] the effect of prohibiting the provision of personal wireless services," within the meaning of Section 332(c)(7)(B)(i)(II).[31]

In other words, "under the better reading of the statute, this limitation of State/local authority applies not just to the first carrier to enter into the market, but also to all subsequent entrants."[32]

The FCC reached this conclusion for several reasons. First, this interpretation was consistent with the statutory language referring to "personal wireless services," plural, meaning more than one carrier.[33] Second, permitting the entry of one carrier to a market to moot a subsequent examination of service to the area "ignores the possibility that the first carrier may not provide service to the entire locality, and a zoning approach that subsequently prohibits or effectively prohibits additional carriers therefore may leave segments of the population unserved or underserved."[34] Third, the FCC rejected the Fourth Circuit's interpretation that a prohibition must be an outright ban. Finally, the FCC found that its construction achieved a balance most consistent with the relevant goals of the TCA to improve service quality and lower prices for consumers, while at the same time preserving the authority of local authorities to regulate wireless facilities under bona fide local zoning concerns.[35]

With the *Declaratory Ruling*, the FCC eliminated in one fell swoop a conflict among the circuits that had interfered with the TCA's goals of setting national standards for providers and municipalities. It appears to have had the desired effect, as at least one district court relied on the *Declaratory Ruling* as "[r]emoving any doubt as to the proper analysis" as to whether a significant gap in coverage existed.[36]

IV. Failure to Act in Reasonable Time

The TCA requires that a municipality "act on any request . . . within a reasonable period of time after the request is duly filed . . . , taking into account the nature and scope of such request."[37] A breach of this requirement supports a cause of action by "[a]ny person adversely af-

31. *Declaratory Ruling*, 24 F.C.C.R. at 14016 (internal quotation omitted).
32. *Id.* at 14017.
33. *Id.*
34. *Id.*
35. *Id.* at 14018.
36. T-Mobile Cent. LLC v. City of Fraser, 675 F. Supp. 2d 721, 729 (E.D. Mich. 2009).
37. 47 U.S.C. § 332(c)(7)(B)(ii).

fected by any . . . failure to act by a State or local government."[38] Providers continued to be concerned about the length of time municipalities took to decide on wireless facility applications—for example, in cases decided in 2009, some applications were pending for periods as long as twenty-two months and six years.[39] Yet, it is difficult to determine at what point a delay could be deemed "unreasonable" and support an action under section 332(c)(7)(B)(v) for "failure to act."

The FCC stepped into this gap in the *Declaratory Ruling*. In addition to resolving the circuit split on gap in coverage, the FCC set a rule for when a delay in deciding an application for a wireless facility would be presumed unreasonable. It ruled that a presumptively reasonable time under section 332(c)(7)(B)(ii) was 90 days for the processing of an application to co-locate on an existing facility and 150 days to process other applications (*i.e.*, for construction of a stand-alone tower or facility). Failure to act on an application within these periods would give rise to a cause of action for failure to act under section 332(c)(7)(B)(v).[40] After discussing at some length its rulemaking authority,[41] the FCC noted the ambiguity of the reasonable time requirement and pointed to the consistent delays in deciding wireless facility applications, which obstructed the provision of wireless services, delayed the deployment of new technologies, and interfered with the public safety protected by wireless 911 service.[42]

The FCC set these deadlines based on the actual practice it saw in the record, with evidence that co-location applications require less time than standalone tower applications.[43] Its intent was to provide incentives for municipalities and providers "to work cooperatively . . . to address community needs."[44] To further these incentives, the FCC provided for some flexibility in the deadlines. It refused to deem an application granted when a municipality missed a deadline.[45] It allowed the deadlines to be extended by mutual consent, which would result in tolling of the thirty day limitations period to bring suit.[46] It emphasized

38. *Id.* § 332(c)(7)(B)(v).
39. T-Mobile Ne. LLC v. Town of Ramapo, No. 08 Civ. 2419, 2009 U.S. Dist. LEXIS 89439, at *22-*23 (S.D.N.Y. Sept. 28, 2009) (22 months); Omnipoint Commc'ns, Inc. v. Town of LaGrange, 658 F. Supp. 2d 539, 543 (S.D.N.Y. 2009) (six years).
40. *Declaratory Ruling*, 24 F.C.C.R. at 13994, 13995, 14005, 14008, 14012 (2009).
41. *Id.* at 14001-03.
42. *Id.* at 14005-08, 14010.
43. *Id.* at 14010, 14012.
44. *Id.* at 14008.
45. *Declaratory Ruling*, 24 F.C.C.R. at 14009.
46. *Id.* at 14013; *see* 42 U.S.C. § 332(c)(7)(B)(v).

that failure to act within the time periods only created a presumption of unreasonableness, which a municipality could rebut.[47] It ruled that the clock does not begin to run until an application is complete, with the municipality obligated to inform an applicant of an incomplete application within a reasonable period of time.[48] Finally it defined when a new antenna on an existing tower would be such a substantial increase in the size of a tower that it could no longer be deemed a "co-location": if the proposal would increase the height of the tower by ten percent, if the necessary equipment required more than four equipment cabinets or one new equipment shelter, if the new antenna protruded from the tower more than 20 feet or the width of the tower, whichever is greater, or if the mounting of the new antenna required off-site excavation.[49]

With the setting of this "shot clock" for deciding wireless applications, the FCC's *Declaratory Ruling* has done what rules are supposed to do: provide clear, attainable, and flexible standards for municipalities and providers under what was previously an ambiguous and unworkable statutory standard.

V. Substantial Evidence: A Locality's Denial Shall Be Supported By Substantial Evidence Contained in a Written Record

In 2009, courts addressed two familiar questions under the substantial evidence standard; namely, whether a municipality's application of its own zoning laws or its use of aesthetic considerations constituted substantial evidence to uphold denial of a provider's application. As the Eighth Circuit recognized, substantial evidence review "requires a reviewing court to determine whether the local authority's decision comports with applicable local law."[50] The review is deferential and the party seeking to overturn a denial bears the burden of showing that it is not supported by substantial evidence.[51]

In 2009, several courts confronted the issue of whether local zoning laws permitted the municipal authority to evaluate and deny an application on the grounds that the proposed facility did not fill a coverage gap

47. *Declaratory Ruling*, 24 F.C.C.R. at 14010-11.
48. *Id.* at 14014.
49. *Id.* at 14012 & n.146.
50. USCOC of Greater Mo. v. City of Ferguson, 583 F.3d 1035, 1042 (8th Cir. 2009).
51. *Id.*

or, if there was a gap, that it was not the only feasible alternative to filling the gap. In *Industrial Tower & Wireless, LLC v. Town of Epping*,[52] the local zoning bylaw required that wireless facilities be located on existing structures if "feasible."[53] The provider argued that it needed to construct a standalone 150-foot tower because there were no feasible existing structures that would fill its coverage gap.[54] The municipality disagreed and denied its application.[55] The district court affirmed, finding that substantial evidence supported the denial because a site using an existing structure was feasible. Although siting on an existing facility would not completely fill the provider's coverage gap, the existing facility could still be feasible. A "facility at an alternative site can be feasible to serve a provider's customers even if it does not close an identified coverage gap all, or even most of, the way that a facility at the provider's proposed site would."[56] A "contrary rule would effectively strip local authorities of their wide latitude in deciding questions related to the siting of telecommunications facilities."[57] Therefore, the "board's decision did not transgress the TCA's 'outer limit' simply because it relied on the feasibility of an alternative location unable to offer precisely the same coverage as" the provider's proposed site.[58] Relying on the *Epping* decision, another judge of the District of New Hampshire held that, for the same reasons, substantial evidence supported the denial of a variance because there were other feasible alternatives to fill at least part of the provider's coverage gap.[59]

The applicable local and state laws could, of course, cut the other way. In *LaGrange*, the court noted that under New York law, wireless providers are public utilities and entitled to a variance if they show a public necessity for their service in the area—in other words, if they show a gap in service.[60] Because the provider made the required showing, and there was no evidence to the contrary, the denial of its application was not based on substantial evidence.[61] In *T-Mobile South,*

52. No. 08-cv-122-JL, 2009 U.S. Dist. LEXIS 70604 (D.N.H. Aug. 11, 2009).
53. *Id.* at *5.
54. *Id.* at *2, *6-*7.
55. *Id.* at *11-*12.
56. *Id.* at *17 (internal quotations omitted).
57. *Indus. Tower & Wireless*, 2009 U.S. Dist. LEXIS 70604, at *18 (internal quotations omitted).
58. *Id.*
59. Indus. Tower & Wireless, LLC v. Town of E. Kingston, No. 07-cv-399-PB, 2009 U.S. Dist. LEXIS 77322, at *22-*28 (D.N.H. Aug. 28, 2009).
60. Omnipoint Commc'ns, Inc. v. Town of LaGrange, 658 F. Supp. 2d 539, 554-55 (S.D.N.Y. 2009).
61. *Id.* at 555-57

LLC v. Coweta County,[62] the court found that a denial based on a provider's failure to prove that it needed to fill a coverage gap was not supported by substantial evidence for the simple reason that "[n]othing in Coweta County's Tower Ordinance requires T-Mobile to 'prove' a coverage gap."[63]

As usual, courts varied widely on when aesthetic objections would be sufficient to constitute substantial evidence to support a denial of a wireless facility application. Courts finding aesthetic objections to constitute substantial evidence usually were able to point to local zoning provisions allowing municipalities to consider the aesthetic impacts on the area surrounding the proposed site. For example, in *Sprint Spectrum, L.P. v. Platte County*,[64] the court upheld the denial of a 153-foot monopole, noting that the local zoning ordinance "expressly directs the Commission to consider aesthetics in deciding whether to permit the construction of towers."[65] In *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*,[66] the court found that the city was a planned community with an ordinance permitting denial of wireless facility applications based on adverse aesthetic impacts.[67] Thus, the city's denial on the grounds that the facility "would detract from the residential character of the neighborhood and . . . would not be in keeping with the appearance of that main entrance to the City" was supported by substantial evidence.[68]

Aesthetic concerns are not always enough to constitute substantial evidence, of course. In *Verizon Wireless Personal Communications LP v. City of Jacksonville*,[69] the court found that the city's denial based on the aesthetic impact of a tower on a neighboring park and wildlife preserve was not based on substantial evidence because there was no evidence that the tower would actually be seen from the park or preserve.[70]

62. No. 1:08-CV-0449-JOF, 2009 U.S. Dist. LEXIS 17067 (N.D. Ga. Mar. 5, 2009).
63. *Id.* at *21.
64. 578 F.3d 727 (8th Cir. 2009).
65. *Id.* at 729-30, 733.
66. 583 F.3d 716 (9th Cir. 2009).
67. *Id.* at 719-20.
68. *Id.* at 726.
69. No. 3:08-cv-1197-J-32TEM, 2009 U.S. Dist. LEXIS 107281 (M.D. Fla. Nov. 17, 2009).
70. *Id.* at *35-*43.

VI. Radio Frequency Emissions: No State or Local Government May Regulate Wireless Facilities on the Basis of the Effects of Radio Frequency Emissions

One of the more straightforward provisions of the TCA provides that "[n]o state or local government may regulate . . . wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC]'s regulations concerning such emissions."[71] This ban means that a municipality cannot regulate or deny a wireless facility application because of fears of the health effects of the radio frequency emissions (RFE), from the facility. In 2009, two cases addressed the RFE ban. In *New York SMSA Ltd. Partnership v. Town of Clarkstown*,[72] the court addressed a Clarkstown ordinance that required providers to submit extensive information on their RFEs as part of an application for a wireless facility.[73] The court held that while the town might legitimately use this information to determine if a proposed facility complied with FCC regulations, any use of the information to make siting decisions was preempted by section 332(c)(7)(B)(iv).[74] In *T-Mobile Northeast LLC v. Town of Ramapo*,[75] one of the town's three stated reasons for its denial of the provider's application "was that the proposal raised health concerns."[76] Not only did this reason violate section 332(c)(7)(B)(iv), it was sufficient to reverse the town's denial, whether or not its other stated reasons for denying the application were valid and supported by substantial evidence.[77]

VII. Conclusion

While issues about unreasonable discrimination, effective prohibition of service, and substantial evidence continue to confront courts, especially in connection with proposals to co-locate, the FCC acted to resolve two issues that courts could not resolve themselves. The FCC simply assumed the duty to resolve the split among the circuits, stretching back almost to the enactment of the TCA, on what constituted the prohibition of service and a gap in coverage that would support a claim

71. 47 U.S.C. § 332(c)(7)(B)(iv).
72. 603 F. Supp. 2d 715 (S.D.N.Y. 2009).
73. *Id.* at 730.
74. *Id.* at 730–31.
75. No. 08 Civ. 2419, 2009 U.S. Dist. LEXIS 89439 (S.D.N.Y. Sept. 28, 2009).
76. *Id.* at *39.
77. *Id.* at *39–*40.

for prohibition of service. It took the ambiguous provision requiring municipalities to act within a reasonable time and defined with certainty a "reasonable time." With these two questions resolved, providers and municipalities can once again seek the balance between preserving local zoning authority and encouraging competition that is embodied in section 332(c)(7).[78] The TCA remains, in the words of the First Circuit, a "refreshing experiment in federalism."[79]

78. ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002).
79. Town of Amherst v. Omnipoint Commc'ns Enters., Inc., 173 F.3d 9, 17 (1st Cir. 1999).

Attachment 3

SUBMISSION FROM CYNTHIA F. ADKINS AND JOHN F. HARRIS

City of Medina & Independent Towers/T-Mobile
PL-13-031 (SUP), PL-13-032 (Variance), and PL-13-033 (SEPA)
July 16, 2014

PROJECT SITE NOT ZONED FOR WIRELESS COMMUNICATIONS FACILITY

The Applicant has requested approval to construct a wireless communications facility in an area that is not zoned for wireless communications use, and, therefore, the application must be denied.

Medina Municipal Code 20.37.060 states:

A. Wireless communication facilities are prohibited in all portions of city parks, except:
    1. Those portions of Fairweather Nature Preserve which are nonforested and adjacent to the state highway right-of-way;

At law, only portions that are adjacent to the state highway right of way are zoned for wireless communications.

"Adjacent" has been defined by the Washington Supreme Court as "abutting" or "touching" (*The City of Arlington v. The Central Puget Sound Growth Management Hearings Board*, 164 Wn.2d 768, 789-90 (2008)), and is defined by Black's Law Dictionary (Third Edition) using the slightly more relaxed standard of, "Lying near or close to, but not necessarily touching."

In our situation, the proposed equipment building is sited on a North South axis, mostly perpendicular to, and away from, the highway right-of-way, with the nearest corner of the equipment building approximately 36' away from the state highway right-of-way and with the furthest corner of the building approximately 100' away from the highway right-of-way.

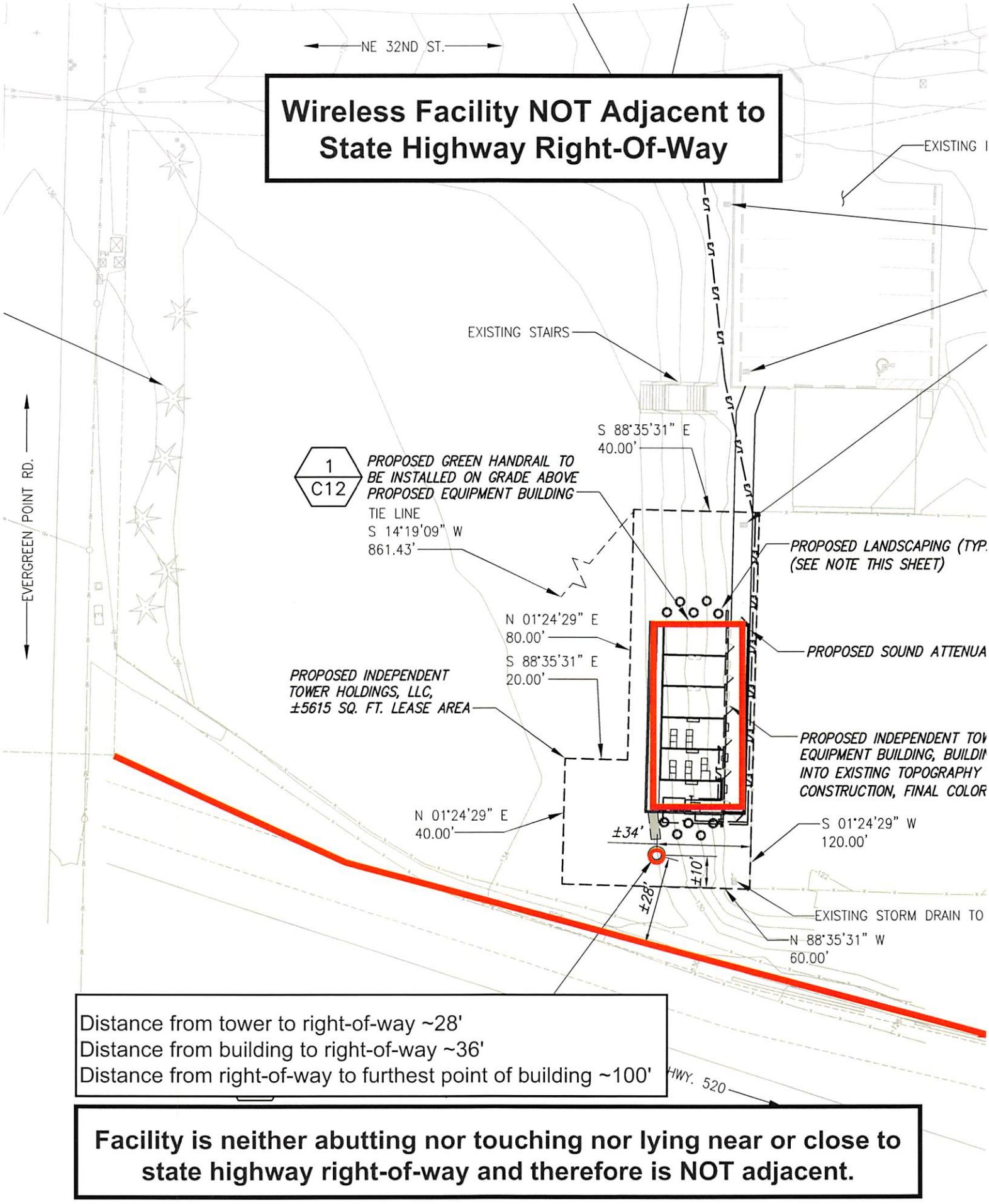
Under applicable law, a building is only adjacent to the highway right of way when it abuts or touches the right of way (*Arlington*). The Independent Towers equipment building is up to 100 feet away from the highway right of way and never closer than 36 feet away from the state highway right of way. It neither abuts nor touches the highway right of way, and, therefore, it is not adjacent to the highway right of way.

Even if the Applicant were to move its equipment building to the south, that would not be sufficient to meet the requirement of "adjacent" unless it also oriented its building to be parallel with the highway right of way. This is supported by the decision of the Hearing Examiner for Hunts Point in T-Mobile's 2010 application for its new wireless facility, where the T-Mobile wireless facility that was positioned parallel to the right-of-way and separated from the right-of-way by less than six feet was deemed "adjacent" to the highway right-of-way (Findings, Conclusions, and Decision Upon Re-Opened Hearing, SUP No. 09-01).

Even if the Applicant had requested a variance and sought permission to build its facility outside of the area zoned for wireless facilities, that variance would be an illegal use variance. It would be deemed to be a special privilege, and special privileges are prohibited by law. MMC 20.72.030(F)(1).

In short, because wireless communication facilities are only permitted in areas that are adjacent to the highway right of way, and because that portion of the park upon which the Applicant wants to construct its wireless communication facilities is not adjacent to the state highway right-of way, the proposed wireless

communication facility would be illegally located in an area not zoned for wireless carrier facilities, and, therefore, the Application must be denied.


NE 32ND ST.
Wireless Facility NOT Adjacent to State Highway Right-Of-Way
EXISTING
EXISTING STAIRS
EVERGREEN POINT RD.
S 88°35'31" E
40.00'
1
C12
PROPOSED GREEN HANDRAIL TO BE INSTALLED ON GRADE ABOVE PROPOSED EQUIPMENT BUILDING
TIE LINE
S 14°19'09" W
861.43'
PROPOSED LANDSCAPING (TYP.
(SEE NOTE THIS SHEET)
N 01°24'29" E
80.00'
S 88°35'31" E
20.00'
PROPOSED SOUND ATTENUA
PROPOSED INDEPENDENT TOWER HOLDINGS, LLC, ±5615 SQ. FT. LEASE AREA
PROPOSED INDEPENDENT TOV
EQUIPMENT BUILDING, BUILDI
INTO EXISTING TOPOGRAPHY
CONSTRUCTION, FINAL COLOR
N 01°24'29" E
40.00'
±34'
S 01°24'29" W
120.00'
±10'
±28'
EXISTING STORM DRAIN TO
N 88°35'31" W
60.00'
Distance from tower to right-of-way ~28'
Distance from building to right-of-way ~36'
Distance from right-of-way to furthest point of building ~100'
HWY. 520
Facility is neither abutting nor touching nor lying near or close to state highway right-of-way and therefore is NOT adjacent.

[redacted]

Attachment 4

LEAST INTRUSIVE MEANS

The proposed facility is a speculative venture designed with significant excess capacity. This type of speculative project is simply incompatible with the "least intrusive means" mandate. Under "least intrusive means", the wireless carrier has the burden of showing that the proposed facility is designed to be the least intrusive as practical for adequate delivery of wireless services.

The only facilities that should thus be considered are the minimum necessary for the applicant carrier to deliver its wireless services. With the recent withdrawal by Verizon Wireless, the only wireless carrier remaining in this application is T-Mobile.

EXHIBIT 1

In the application for the tower at Hunts Point, when pressed by the Hearing Examiner, T-Mobile ultimately conceded that they required just 165 sq. ft. for their equipment shelter. The application before you is for a concrete shelter in excess of 1,500 sq. ft. – more than 9 times the space required by the applicant carrier with no detailed equipment list nor analysis that provides justification.

As with Hunts Point, this project should be limited to the minimum footprint required for the applicant carrier. If a future tenant is identified, additional space can be added that is tailored to the new tenant in an expansion - just as was decided for Hunts Point.

EXHIBIT 2

With respect to the size of the tower, when pressed by the Hearing Examiner in the Hunts Point application, the three carrier applicants conceded that only a 32" pole was required. This application is for a 36" in diameter pole for a single carrier. This project should be required to limit the size of the pole to the minimum diameter necessary.

Further, this application lacks any meaningful analysis of the minimum height requirement for the applicant carrier. For years, T-Mobile has resided in the vicinity on a utility pole of just 35'. There is no data presented that demonstrates that anything more than this is required.

EXHIBIT 3

In addition, the proposed installation calls for a lighting fixture on the pole. Lighting of any kind is simply inconsistent with "least intrusive" to the local residences at night.

Finally, under the least intrusive means standard, the applicant bears the burden of showing that a particular site is the least intrusive location. The application before you lacks any meaningful analysis of alternative locations as required by law.

There is no analysis of options to co-locate T-Mobile's antenna on other carrier facilities in the immediate vicinity, such as with AT&T right here at Three Points.

There is no analysis of the various options that exist for locating T-Mobile's antenna on existing utility poles.

And there is no analysis of alternate sites for a new antenna in a location that would reduce the impact on our residential community, such as in the DOT right-of-way.

[redacted]

Contrast this complete absence of analysis with what was done for the City of Anacortes, where T-Mobile undertook and submitted in its application a detailed analysis of 18 alternate sites for their antenna.

With the absence of any alternate-site and facility analysis, the application before you fails to meet even a "good faith" standard in applying the least intrusive means criteria required by law. This application should be denied.

Findings from Hearing Examiner Review of Hunts Point Relocation Tower Application

5. The Decision provided that "[i]f additional evidence becomes available to the Applicant that may add support to his application, the hearing may be re-opened following public notice to consider that additional information at an open record hearing." Decision at 15.

6. On June 15, 2010, Verizon Wireless and T-Mobile filed requests that the Hearing Examiner reconsider the Decision and reopen the hearing to allow the Applicants to provide additional information in support of the application per the Decision. On June 22, 2010, the Hearing Examiner issued a Notice of Intent to Re-open the Hearing on July 20, 2010.

7. At the re-opened hearing, the Applicant submitted additional information and evidence to address the four issues of concern in the Decision in the form of testimonial and documentary evidence. *Testimony of Matt Cagan; Testimony of Chris Martin; Exhibit 19.*

8. Regarding the issue of whether a variance was required for an equipment shelter that will exceed 200 square feet, the Applicants argued that HPMC 18.43.008(8)(a) expressly allows deviations from the 200 square foot floor area limitation and seven foot height limitations through the Special Use Permit approval process, and that a variance was therefore not required. The City planner, Mona Green, and the City Attorney, Margaret King, agreed with Applicant's interpretation.

9. Regarding the issue of whether the proposed equipment shelter was the least intrusive as practicable, Matt Cagan testified that Verizon Wireless and T-Mobile asked their engineers to see if they could reduce the size of the proposed equipment shelter. Their intent was to design the equipment shelter to be the minimum necessary to operate the wireless communication facilities consistent with safety standards. *Testimony of Mr. Cagan.*

10. According to Mr. Cagan, Verizon and T-Mobile achieved reductions in the size of the equipment shelter in three ways. First, the space set aside for a fourth carrier was eliminated. This eliminated approximately 175 square feet of floor area. Mr. Cagan testified that the space should be added if and when there is a fourth carrier. Second, Verizon Wireless eliminated the back up emergency generator. This eliminated approximately 111 square feet of floor area. Third, T-Mobile was able to reduce its space needs by approximately 30 square feet (from 195 square feet to 165 square feet), based on a detailed report of its equipment space needs. *Exhibit 19(B)(3).* Verizon Wireless also prepared a detailed report on its equipment space needs. *Exhibit 19(B)(2).* According to this report, Verizon Wireless will need the same amount of space for its radio equipment as shown in the original plans. Overall, Verizon and T-Mobile were able to achieve a reduction of 308 feet of total floor space and approximately 28 feet in the length of the equipment shelter. As revised, the equipment shelter is now proposed to be approximately 38-feet-by-11-feet-by-10-feet instead of the originally proposed 66-feet-by-11-feet-by-10-feet. According to Verizon's and T-Mobile's engineers, this is the minimum necessary and the least intrusive as practicable consistent with safe functioning of the equipment needed to operate their respective wireless communication facilities. The actual height of the equipment shelter will depend on the architectural design, such

Note that equipment building requested at Fairweather Park is 1,525 sq. ft., more than 9x what was determined to be "least intrusive" by T-Mobile at Hunts Point.

as, for example, whether a pitched roof or flat roof is required and the desired slope of the pitched roof. *Testimony of Mr. Cagan; Exhibit 19(A); Exhibit 19(B)(1)-(3).*

11. Regarding the issue of whether the proposed monopole is designed to be the least intrusive as practicable, the Applicants submitted a report from Adapt Engineering that addresses whether the pole design can be revised to reduce the height or diameter of the proposed pole. Exhibit 19(C). The reference to Sheet A-3.4 in the report is in error. It should be to Sheet A-4.0 in Exhibit 19(A). According to the report, the diameter of the pole can be reduced from 36 inches to 32 inches and still accommodate all of the Applicant's antennas and equipment. If the City wants to reserve space for a fourth future carrier, Adapt Engineering recommends that the pole diameter remain at 36 inches. *Testimony of Mr. Cagan; Exhibit 19(A); Exhibit 19 (C)(1).*

12. Also according to the report, the height of the pole is dictated by the RF technical analysis provided by each of the three Applicants. Verizon Wireless's RF needs are demonstrated in the RF report already in the record as Exhibit 16. It shows a need for an antenna RAD center of 70 feet, as shown on the revised plans, Exhibit 19(A), Sheet A-4.0. *Testimony of Mr. Cagan; Exhibit 16; Exhibit 19(A); Exhibit 19 (C)(1).*

13. T-Mobile's RF needs are demonstrated in the Radio Frequency Engineer Site Analysis, Exhibit 17, and a supplemental letter report, Exhibit 19(C)(2), both prepared by Chris Martin, Design Engineer for T-Mobile. Collectively, these reports show a need for an antenna RAD center at 82 feet. This is also shown on the revised plans in Exhibit 19(A), Sheet A-4.0. The reference on page 2, line 3, of the supplemental report should read Sheet A-4.0 and not Sheet A3-4. *Testimony of Chris Martin; Exhibit 17; Exhibit 19(C)(2).*

14. Additional RF information regarding Clearwire's antenna and RF needs is provided in a letter from Ross Galang, Microwave Engineer for Clearwire. *Exhibit 19(C)(3).* It demonstrates Clearwire's need to install two 24 inch diameter microwave radio dishes. This information supplements the RF justification supporting the Hearing Examiner's approval of the 77 foot tower for Clearwire. *Exhibit 19(C)(3),(4).*

15. Collectively, these RF reports state that 97 feet is the minimum height necessary for all three Applicants to provide functionally satisfactory wireless service from the proposed WCF.

16. Whether space is reserved for a fourth collocator does not affect the overall height of the proposed replacement pole since 70 feet is the minimum height from which Verizon's antennas can function satisfactorily within its wireless network. T-Mobile's and Clearwire's antennas must go above Verizon's antennas inside the replacement stealth pole. Therefore, even with just the three Applicant carriers, the minimum height of the replacement pole remains at 97 feet. *Testimony of Chris Martin; Exhibit 19(C)(2).*

17. Regarding the issue of whether the proposed monopole is designed to accommodate a fourth carrier, the collocation space below Verizon's is designed to meet the needs of a "typical" wireless carrier, which would include three panel antennas together with the

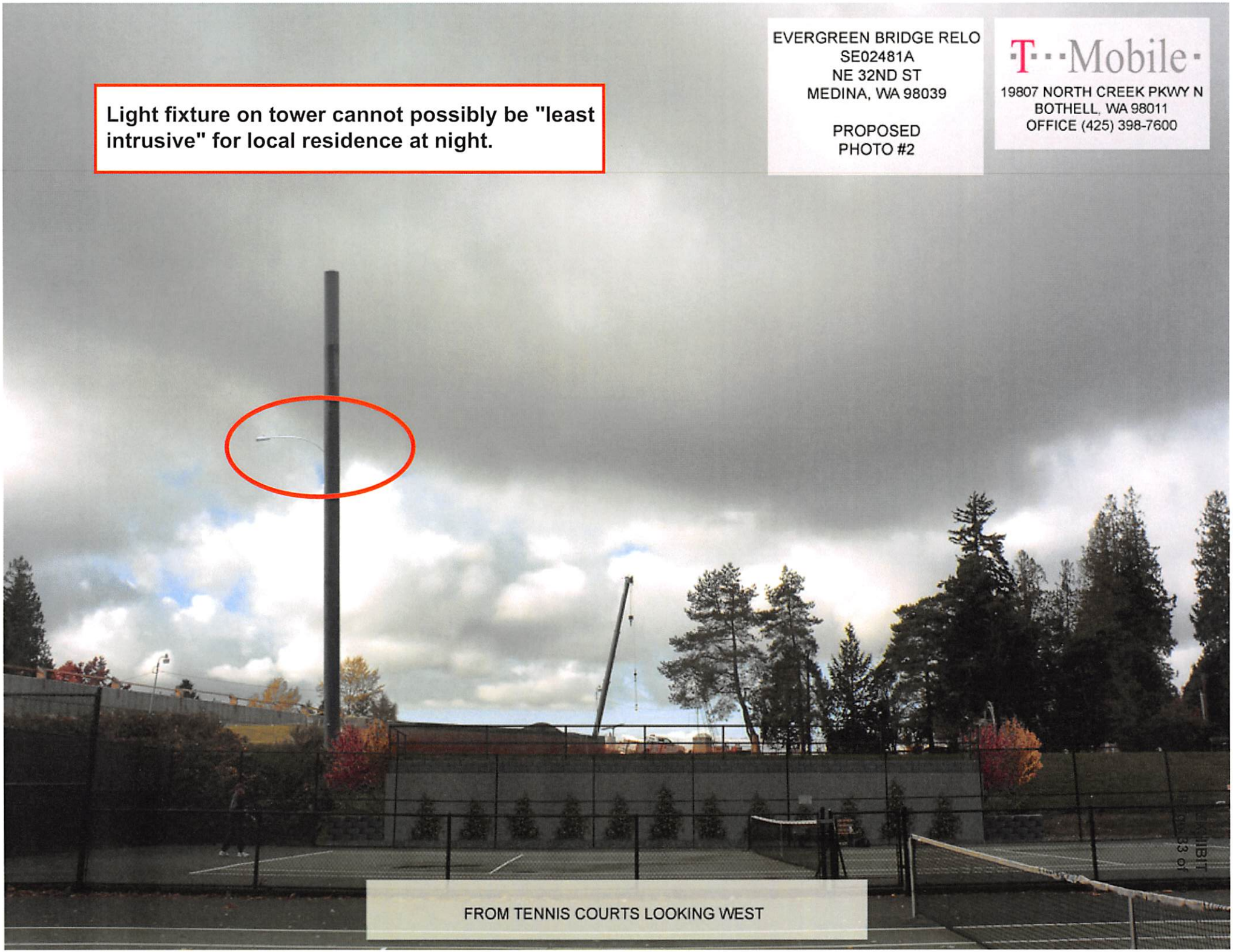
Note that proposed pole at Fairweather is 36" in diameter for one carrier, larger than what was determined to be "least intrusive" at Hunts Point for 3 carriers.

Light fixture on tower cannot possibly be "least intrusive" for local residence at night.

EVERGREEN BRIDGE RELO
SE02481A
NE 32ND ST
MEDINA, WA 98039

PROPOSED
PHOTO #2

T-Mobile
19807 NORTH CREEK PKWY N
BOTHELL, WA 98011
OFFICE (425) 398-7600



FROM TENNIS COURTS LOOKING WEST

EXHIBIT
33 of

Attachment 5

SUBMISSION FROM CYNTHIA F. ADKINS AND JOHN F. HARRIS

City of Medina & Independent Towers/T-Mobile
PL-13-031 (SUP), PL-13-032 (Variance), and PL-13-033 (SEPA)
July 16, 2014

Failure to demonstrate need

In their application T-Mobile has not presented substantial evidence to support that it needs an antenna at this location in order to provide adequate wireless communication coverage to the residents of the city, the traveling public, and others within the city's jurisdiction.

EXHIBIT 1

This exhibit produced by T-Mobile for the tower at Hunts Point in 2011 emphasizes the coverage of the new cell tower that came on-line over one year ago. This tower came on-line for T-Mobile more than a year ago.

Note that this new tower provided excellent in-house coverage at several locations along the Hunts Point waterfront including here and at Cozy Cove.

EXHIBIT 2

It is interesting to compare this with the coverage plots produced by T-Mobile for the Fairweather application.

This is the coverage plot provided in the application that shows coverage with no cell tower

EXHIBIT 3

And here is the only other coverage plot with an 80' cell tower.

It appears that both plots in the Fairweather application omit the coverage enabled by the new T-Mobile Hunts Point installation that has been on-line for more than one year. If this is the case, the plots are invalid, and there is insufficient evidence in the application to support that this current data has been included.

EXHIBIT 4

Exhibit 41 of the application is an RF coverage analysis performed by SpectraNet on behalf of Independent Towers, LLC. Throughout the entire analysis, the location of the cell tower used in the SpectraNet simulations is sited to the South of State Highway 520 on Evergreen Point Road and NOT on Fairweather Park. The entire analysis for the Fairweather site is thus invalid.

EXHIBIT 5

What that analysis does support on this chart however is that antenna at just 26' above ground level at the erroneous site used in their plots provides a signal that reaches the water surrounding the 520 bridge. Once the signal reached the water, it likely propagates for distances in excess of the bridge.

The Washington Supreme Court defines "substantial evidence" as "evidence sufficient to persuade a fair-minded person of the order's truth or correctness."

With the apparent omission of the coverage provided by the Hunts Point Tower, located just 2,700 feet away, and the incorrect location of the proposed tower in the SpectraNet analysis, there is no valid coverage data provided in the application that supports that the Fairweather Park and Nature Preserve Site is even required to provide adequate wireless communication coverage.

The application is therefore deficient in providing substantial evidence that a cell tower is even required in this vicinity and therefore the Special Use Permit should be denied.

SUBMISSION FROM CYNTHIA F. ADKINS AND JOHN F. HARRIS

City of Medina & Independent Towers/T-Mobile
PL-13-031 (SUP), PL-13-032 (Variance), and PL-13-033 (SEPA)
July 16, 2014

Please see Exhibit 2, where T-Mobile's own evidence shows that in this general area near the 520, at 26 feet, there is service coverage to the 520 floating bridge. This is Exhibit 41 of the Staff Report. It's an RF coverage analysis performed by SpectraNet on behalf of Independent Towers, LLC. In error, the antenna pinpoints that were used throughout the entire analysis are located SOUTH of Highway 520 along Evergreen Point Road, not NORTH of Highway 520 in Fairweather Park, and, therefore, the entire analysis and conclusions are invalid with respect to Fairweather Park. However, their analysis does support a conclusion that an antenna at just 26' above ground level in this general vicinity will provides a signal that reaches the water surrounding the 520 bridge, and, once the signal reaches the water, it likely propagates and provides adequate coverage on the 520 bridge.

III. And, even if T-Mobile had demonstrated that there would be a significant gap in coverage on the 520 floating bridge if the antenna were at 35 feet, it's not reasonable to conclude that T-Mobile needs a height of over 45 feet:

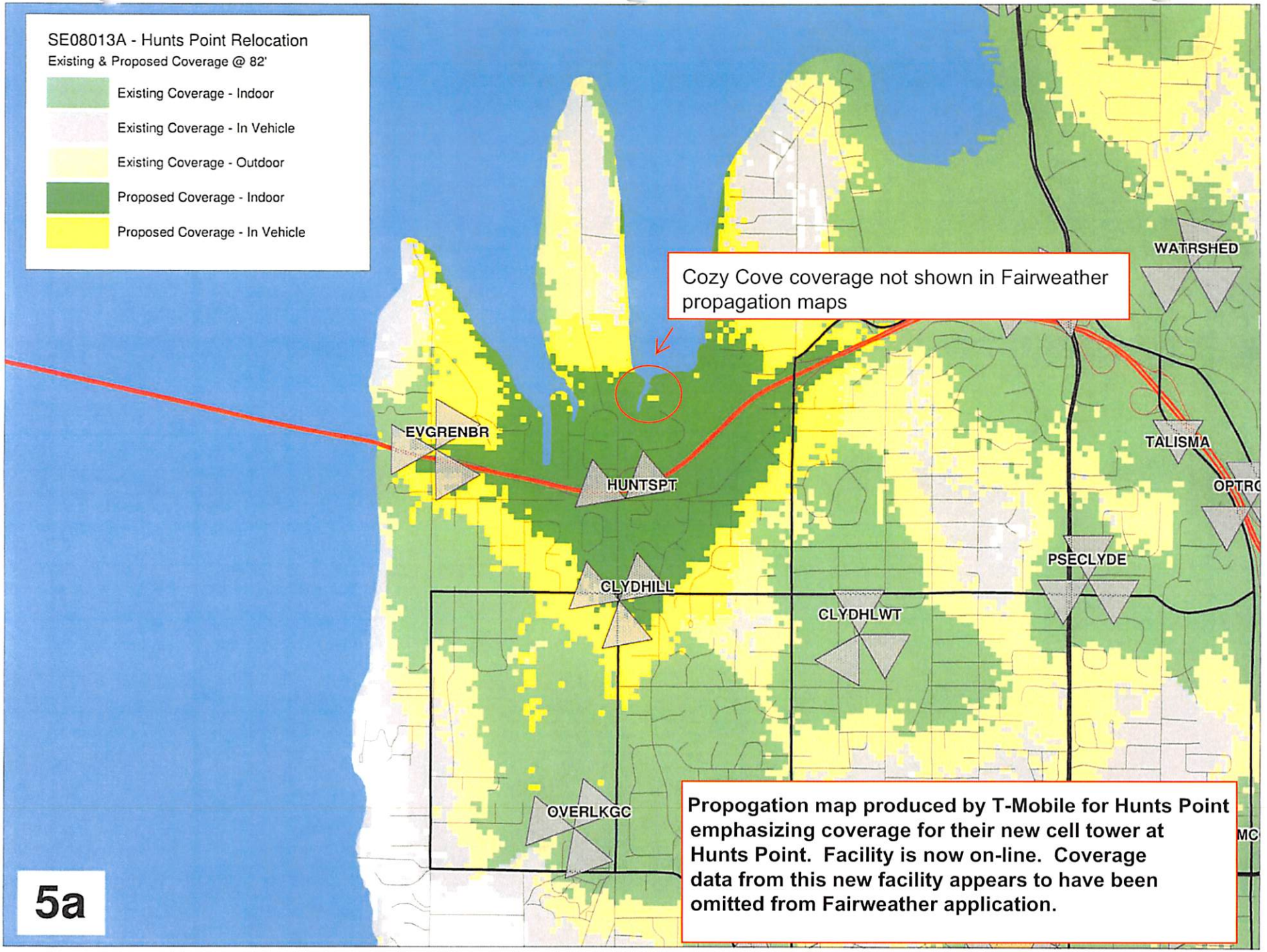
Please see Exhibit 3, showing that T-Mobile is currently at 45-feet at the temporary tower. On T-Mobile's consumer website you can check the level of coverage in a particular area. This report from T-Mobile's consumer website shows that, with a 45-foot temporary tower on Fairweather Park, coverage throughout Medina is, in the words of T-Mobile, "Excellent".

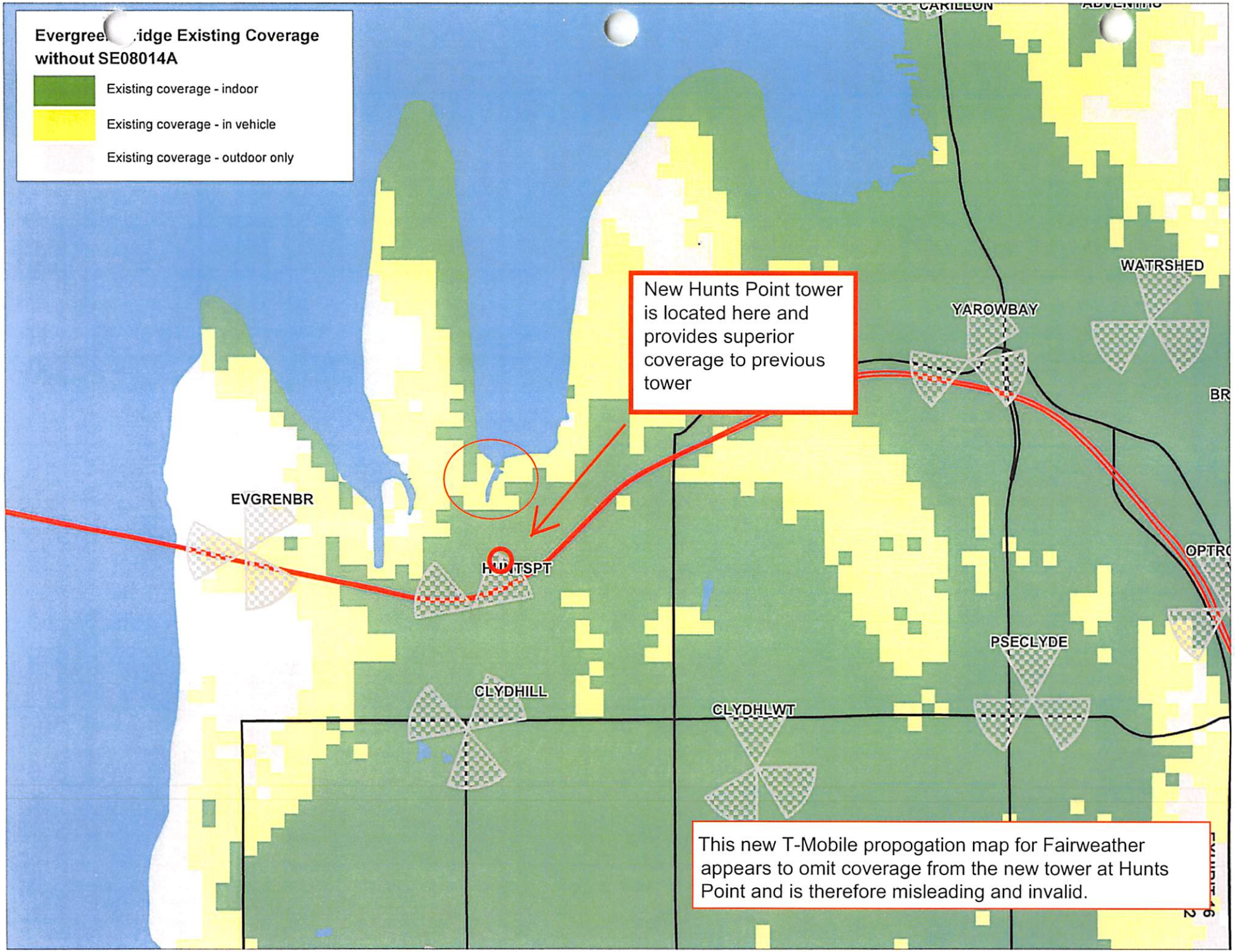
Please see Exhibit 4, showing that when using the "Map a Route" feature on T-Mobile's consumer website, a drive from Hunts Point over the 520 Bridge to Seattle also rates as "Excellent" throughout.

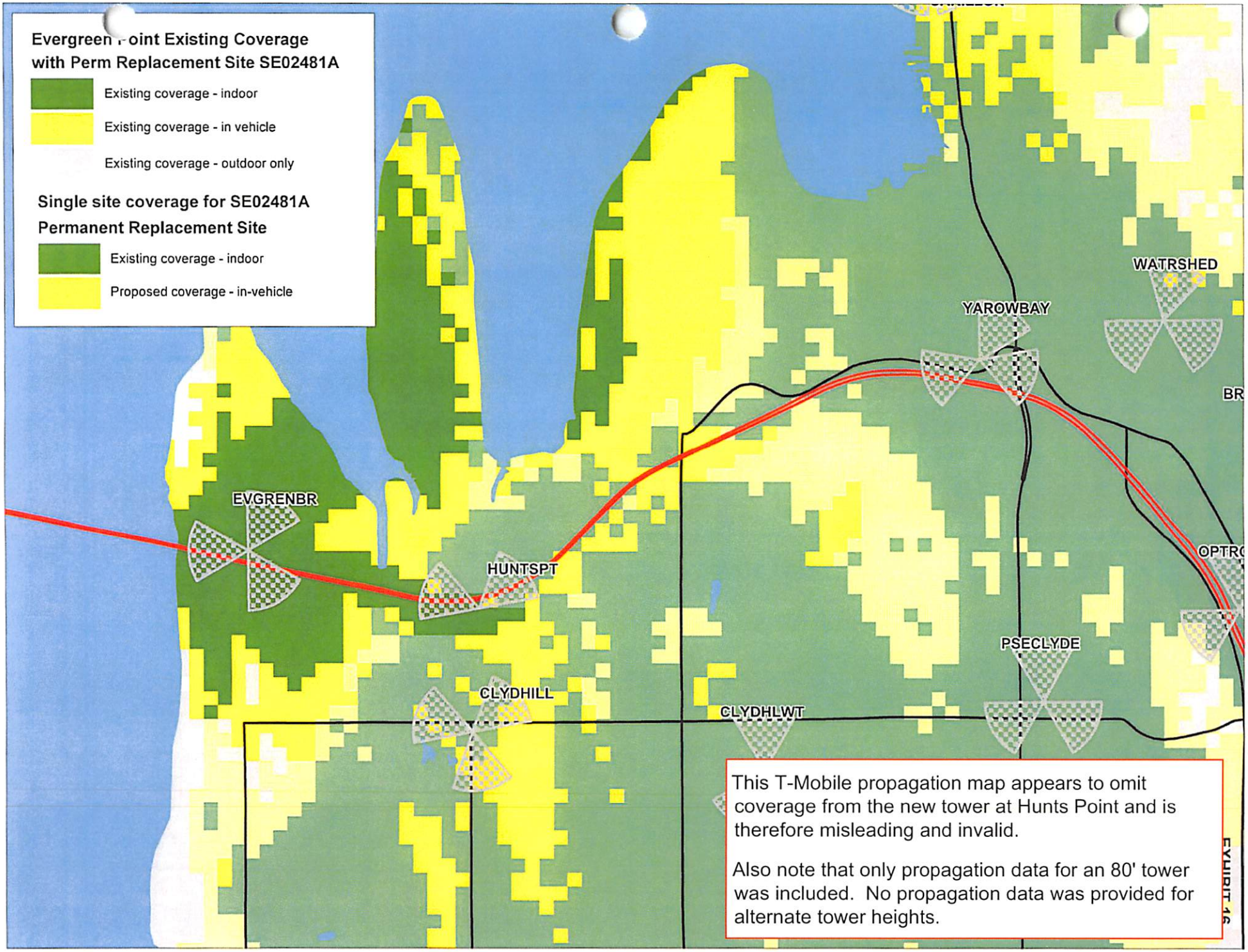
Please see Exhibit 5, which is from T-Mobile's application for their Hunts Point tower, T-Mobile's propagation maps show a strong signal reaching the water when they resided on what we believe was a 35-45 foot tower.

We believe that T-Mobile was at 45 feet at its 2011 site (SE08014A) that was in the WSDOT right of way in this vicinity but to the south of 520. If so, then that would further support restricting the height of T-Mobile's antenna to 45 feet.

In short, T-Mobile has provided no substantial evidence to support that there would be any significant gap in service coverage on the SR520 floating bridge at 35 feet, and it has not requested a height variance, and, therefore, if the Application is approved, the tower facility should not exceed 35 feet.

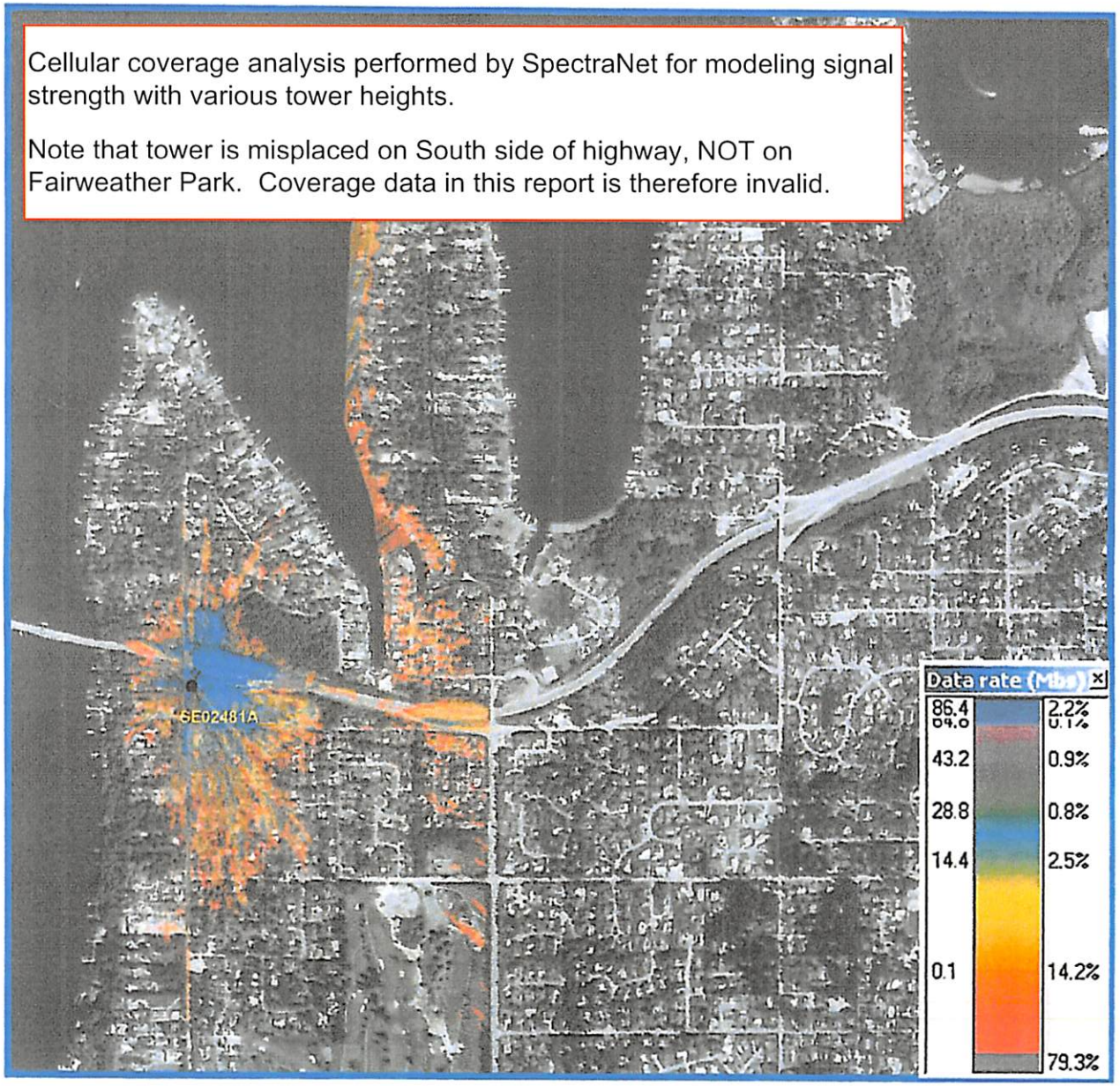

SE08013A - Hunts Point Relocation
Existing & Proposed Coverage @ 82'
Existing Coverage - Indoor
Existing Coverage - In Vehicle
Existing Coverage - Outdoor
Proposed Coverage - Indoor
Proposed Coverage - In Vehicle
Cozy Cove coverage not shown in Fairweather propagation maps
WATRSHED
EVGRENBR
HUNTSPT
TALISMA
OPTRC
PSECLYDE
CLYDHILL
CLYDHLWT
OVERLKGC
Propogation map produced by T-Mobile for Hunts Point emphasizing coverage for their new cell tower at Hunts Point. Facility is now on-line. Coverage data from this new facility appears to have been omitted from Fairweather application.
5a


Evergreen Ridge Existing Coverage without SE08014A
Existing coverage - indoor
Existing coverage - in vehicle
Existing coverage - outdoor only
New Hunts Point tower is located here and provides superior coverage to previous tower
WATRSHED
YAROWBAY
EVGRENBR
HUNTSPT
PSECLYDE
CLYDHILL
CLYDHLWT
This new T-Mobile propogation map for Fairweather appears to omit coverage from the new tower at Hunts Point and is therefore misleading and invalid.


Evergreen Point Existing Coverage
with Perm Replacement Site SE02481A
Existing coverage - indoor
Existing coverage - in vehicle
Existing coverage - outdoor only
Single site coverage for SE02481A
Permanent Replacement Site
Existing coverage - indoor
Proposed coverage - in-vehicle
WATRSHED
YAROWBAY
EVGRENBR
HUNTSPT
PSECLYDE
CLYDHILL
CLYDHLWT
This T-Mobile propagation map appears to omit coverage from the new tower at Hunts Point and is therefore misleading and invalid.
Also note that only propagation data for an 80' tower was included. No propagation data was provided for alternate tower heights.

Cellular coverage analysis performed by SpectraNet for modeling signal strength with various tower heights.

Note that tower is misplaced on South side of highway, NOT on Fairweather Park. Coverage data in this report is therefore invalid.



Cellular Coverage Analysis for T-Mobile BTS in Medina Fairweather Park

Notes

1. Site ID: SE02481A
2. RAD CL: 66' AGL
3. Antennas: Andrew TMBXX-6516-R2M
4. Antenna Az: 30°, 150°, and 270°
5. 5972 W EIRP
6. GSM voice call corresponds to 0.1 Mbps on legend.
7. Other data-rates are for LTE (20 MHz Ch)
8. 2100 MHz

Revision History

7/5/2014

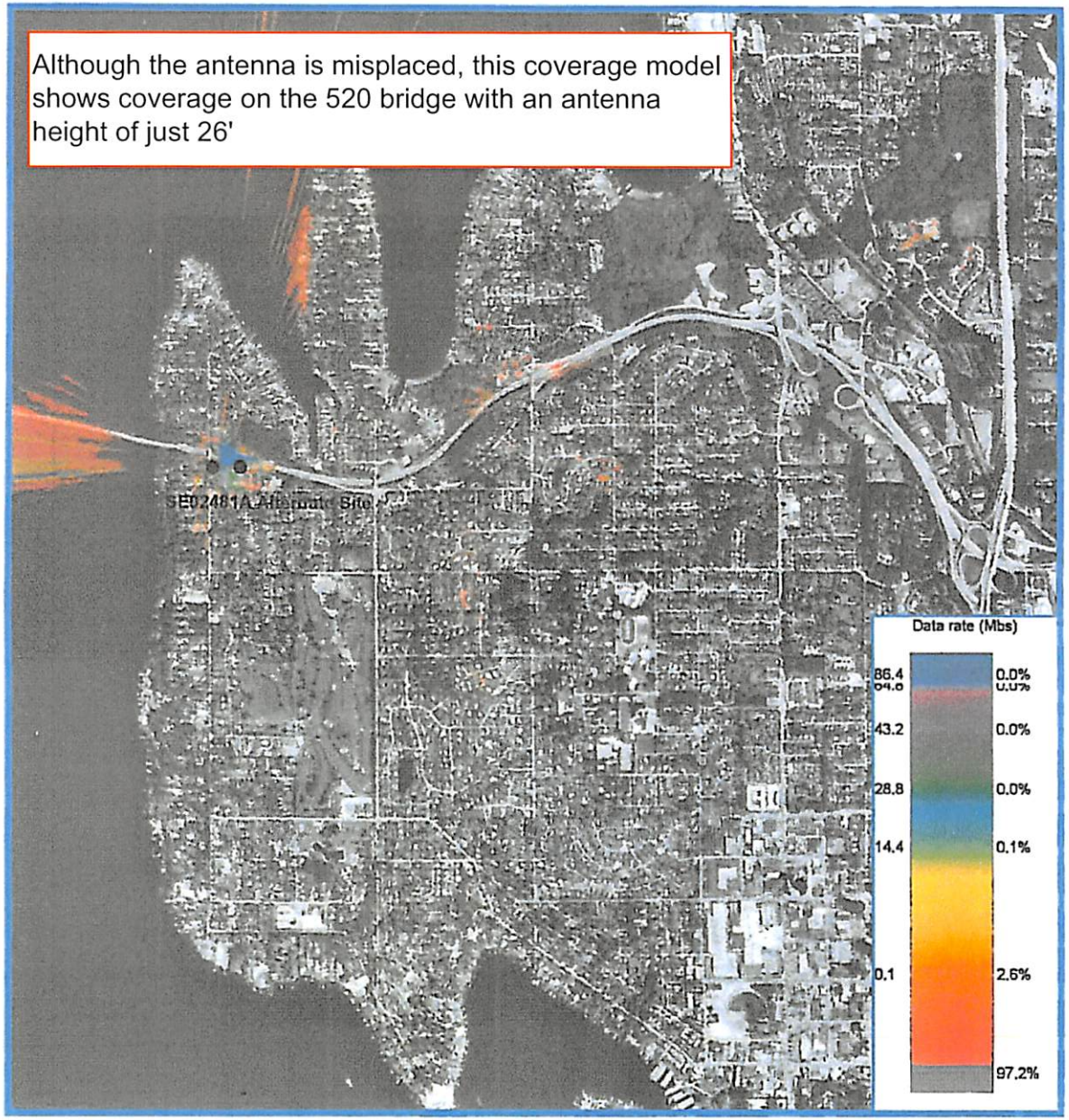
Project

Independent Towers, LLC

Engineer

J. C. Adams, P.E.

SPECTRANET
wireless consulting



Cellular Coverage Analysis for T-Mobile BTS in Medina Fairweather Park

Notes

1. Site ID: SE02481A
2. RAD CL: **26' AGL**
3. Antennas: Andrew TMBXX-6516-R2M
4. Antenna Az: 30°, 150°, and 270°
5. 5972 W EIRP
6. GSM voice call corresponds to 0.1 Mbps on legend.
7. Other data-rates are for LTE (20 MHz Ch)
8. 2100 MHz

Revision History

7/7/2014

Project

Independent Towers, LLC

Engineer

J. C. Adams, P.E.

SPECTRANET
wireless consulting

Attachment 6

SUBMISSION FROM CYNTHIA F. ADKINS AND JOHN F. HARRIS

City of Medina & Independent Towers/T-Mobile
PL-13-031 (SUP), PL-13-032 (Variance), and PL-13-033 (SEPA)
July 16, 2014

HEIGHT OF TOWER MUST BE LIMITED TO 35 FEET

I. The law says that a tower facility must be 35 feet or less. Medina Municipal Code 20.37.070(B)(2) provides: "The maximum height of the wireless communications facility including the height of the antenna, **shall not exceed 35 feet** above original or finished grade, whichever is lower."

There are two ways under the Medina code for an applicant to legally build a higher tower facility. The first way is to request and receive a height variance. In our case, the Applicant has not requested a height variance, and, therefore, that option does not apply.

The second way to legally build a higher tower facility is to demonstrate through substantial evidence that the requested increase in height is necessary to avoid a significant gap in service coverage on the 520 bridge. If that proof is made, then the increase in height, to the minimum height necessary, may be approved without a variance. Medina Municipal Code 20.37.070(B)(3) provides: "The maximum height may be increased up to 80 feet without a variance if:

> (a) The wireless communication facility is located in Fairweather Nature Preserve consistent with MMC 20.37.060(A); and
> (b) The increase in height is the minimum necessary to avoid a significant gap in service coverage on the SR520 floating bridge."

The Applicant fails on the first prong, because the location of the proposed facility is not located "adjacent" to the state highway right of way.

The Applicant also fails on the second prong, because the Applicant has not demonstrated with any substantial evidence that T-Mobile needs a facility in excess of 35 feet to avoid a significant gap in service coverage on the SR520 floating bridge. In fact, T-Mobile's own letter supports a finding that there would be no significant gap in coverage even if there was no T-Mobile antenna at all at the proposed site. The T-Mobile letter provides in relevant part, "Without this [new] site, there would be a coverage gap along the floating bridge." If by T-Mobile's own admission there would be no significant gap in coverage even if there were no new antenna at all, then there is no basis for concluding that there would be a significant gap in coverage with a new antenna at 35 feet.

II. And, even if T-Mobile had demonstrated that there would be a significant gap in coverage on the 520 floating bridge if there were no antenna at all, it's not reasonable to conclude that T-Mobile needs a height of over 35 feet, for at least two reasons:

Please see Exhibit 1 (Exhibit C from the lease), showing that T-Mobile originally reserved the 35-foot slot, not the 45-foot slot, at the current temporary tower. This is an Attachment to the Lease Agreement between The City of Medina and Independent Towers, showing that the then-proposed 45-foot temporary pole put T-Mobile at the 35-foot slot and AT&T at the 45-foot slot. The fact that T-Mobile had originally reserved the 35-foot slot, and only moved up to the 45-foot slot after AT&T dropped out, supports the conclusion that the 35-foot slot is acceptable for T-Mobile to provide adequate wireless services, and T-Mobile has provided no evidence to the contrary.

SUBMISSION FROM CYNTHIA F. ADKINS AND JOHN F. HARRIS

City of Medina & Independent Towers/T-Mobile
PL-13-031 (SUP), PL-13-032 (Variance), and PL-13-033 (SEPA)
July 16, 2014

Please see Exhibit 2, where T-Mobile's own evidence shows that in this general area near the 520, at 26 feet, there is service coverage to the 520 floating bridge. This is Exhibit 41 of the Staff Report. It's an RF coverage analysis performed by SpectraNet on behalf of Independent Towers, LLC. In error, the antenna pinpoints that were used throughout the entire analysis are located SOUTH of Highway 520 along Evergreen Point Road, not NORTH of Highway 520 in Fairweather Park, and, therefore, the entire analysis and conclusions are invalid with respect to Fairweather Park. However, their analysis does support a conclusion that an antenna at just 26' above ground level in this general vicinity will provides a signal that reaches the water surrounding the 520 bridge, and, once the signal reaches the water, it likely propagates and provides adequate coverage on the 520 bridge.

III. And, even if T-Mobile had demonstrated that there would be a significant gap in coverage on the 520 floating bridge if the antenna were at 35 feet, it's not reasonable to conclude that T-Mobile needs a height of over 45 feet:

Please see Exhibit 3, showing that T-Mobile is currently at 45-feet at the temporary tower. On T-Mobile's consumer website you can check the level of coverage in a particular area. This report from T-Mobile's consumer website shows that, with a 45-foot temporary tower on Fairweather Park, coverage throughout Medina is, in the words of T-Mobile, "Excellent".

Please see Exhibit 4, showing that when using the "Map a Route" feature on T-Mobile's consumer website, a drive from Hunts Point over the 520 Bridge to Seattle also rates as "Excellent" throughout.

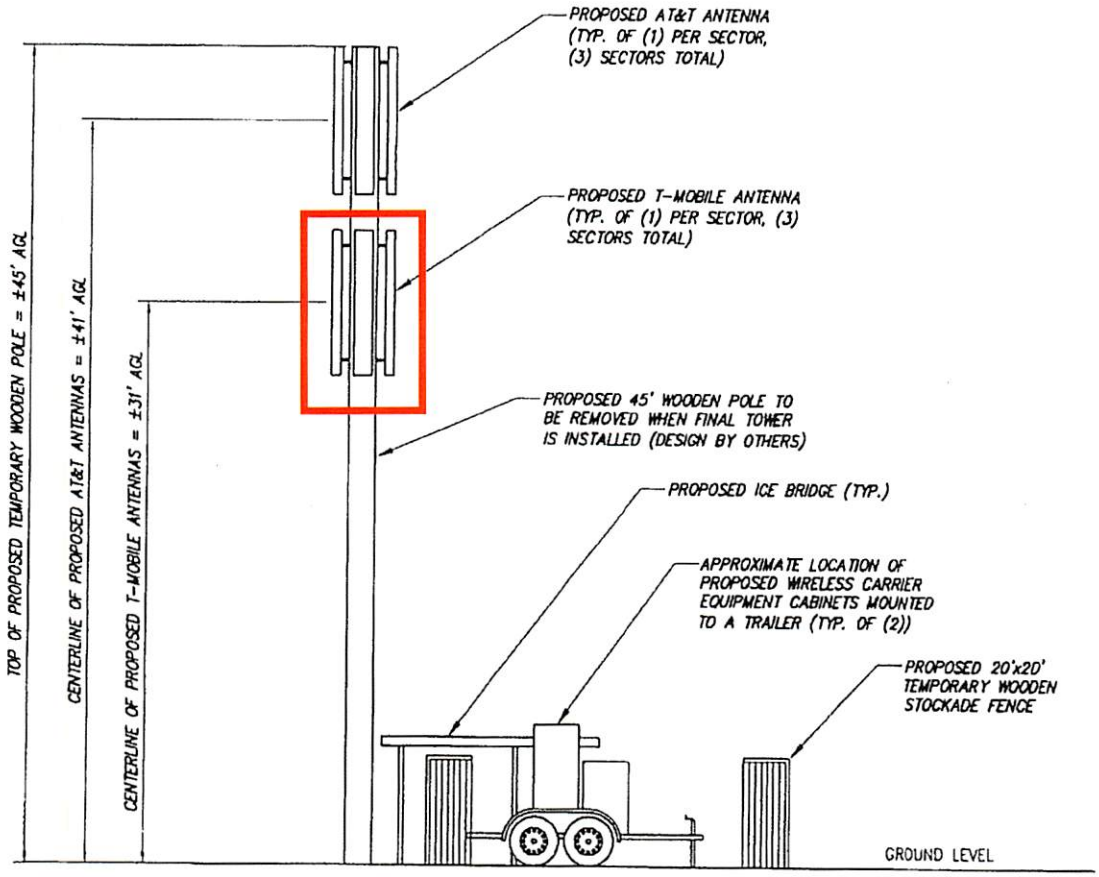
Please see Exhibit 5, which is from T-Mobile's application for their Hunts Point tower, T-Mobile's propagation maps show a strong signal reaching the water when they resided on what we believe was a 35-45 foot tower.

We believe that T-Mobile was at 45 feet at its 2011 site (SE08014A) that was in the WSDOT right of way in this vicinity but to the south of 520. If so, then that would further support restricting the height of T-Mobile's antenna to 45 feet.

In short, T-Mobile has provided no substantial evidence to support that there would be any significant gap in service coverage on the SR520 floating bridge at 35 feet, and it has not requested a height variance, and, therefore, if the Application is approved, the tower facility should not exceed 35 feet.

Exhibit C

Original contemplated placement for T-Mobile on temporary tower was at 35'. This would have been unacceptable to T-Mobile if it had resulted in a significant gap in coverage on the SR 520 bridge



1 TEMPORARY WOODEN POLE ELEVATION
NOT TO SCALE

PAGE 4 OF 4

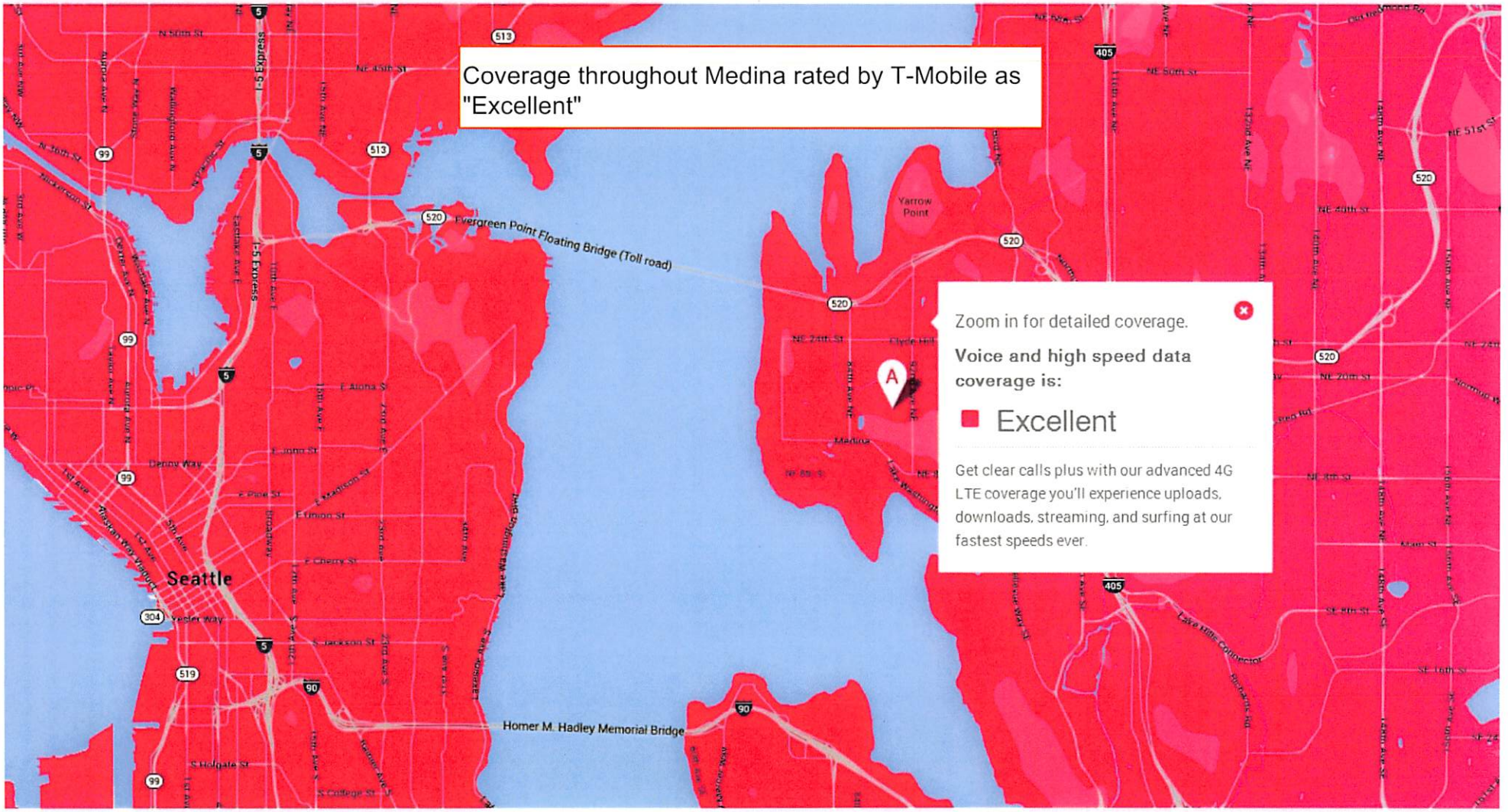
INDEPENDENT TOWERS HOLDINGS LLC NORTHEAST OFFICE 11 HERBERT DRIVE LATHAM, NY 12110 CONTACT: KORY P. FRETTO C: 518.369.5833 P: 518.608.4806 F: 518.690.0793	infinigy engineering 11 Herbert Drive Latham, NY 12110 OFFICE: (518) 690-0790 FAX: (518) 690-0793	LEASE EXHIBIT – MEDINA FAIRWEATHER PARK SITE I.D./SITE NAME: MEDINA FAIRWEATHER PARK TAX I.D.: TBD PROPERTY OWNER: CITY OF MEDINA SITE ADDRESS: NE 32ND ST. MEDINA, WA 98039		
		DRAWING SCALE: AS NOTED	DATE: 11/2/11	REV: 8

T··Mobile·

SHOP COVERAGE

Find

98039 CHECK COVERAGE Map a route ➤ Map multiple locations ➤



Zoom in and click on the map to check signal strength.

The definitions and user experience may differ for dedicated Mobile Internet devices such as Mobile HotSpots, Tablets, and Laptop Sticks. For more details, see a Retail Associate at the nearest T-Mobile Retail Store.

MAP INFORMATION: Capable device and qualifying service required for network connection, Wi-Fi calling, and 3G, 4G, and 4G LTE speeds. Roaming and on-network data allotments may differ. Maps approximate ant coverage outdoors, based on a variety of factors, and do not guarantee service availability. Learn more.

Share

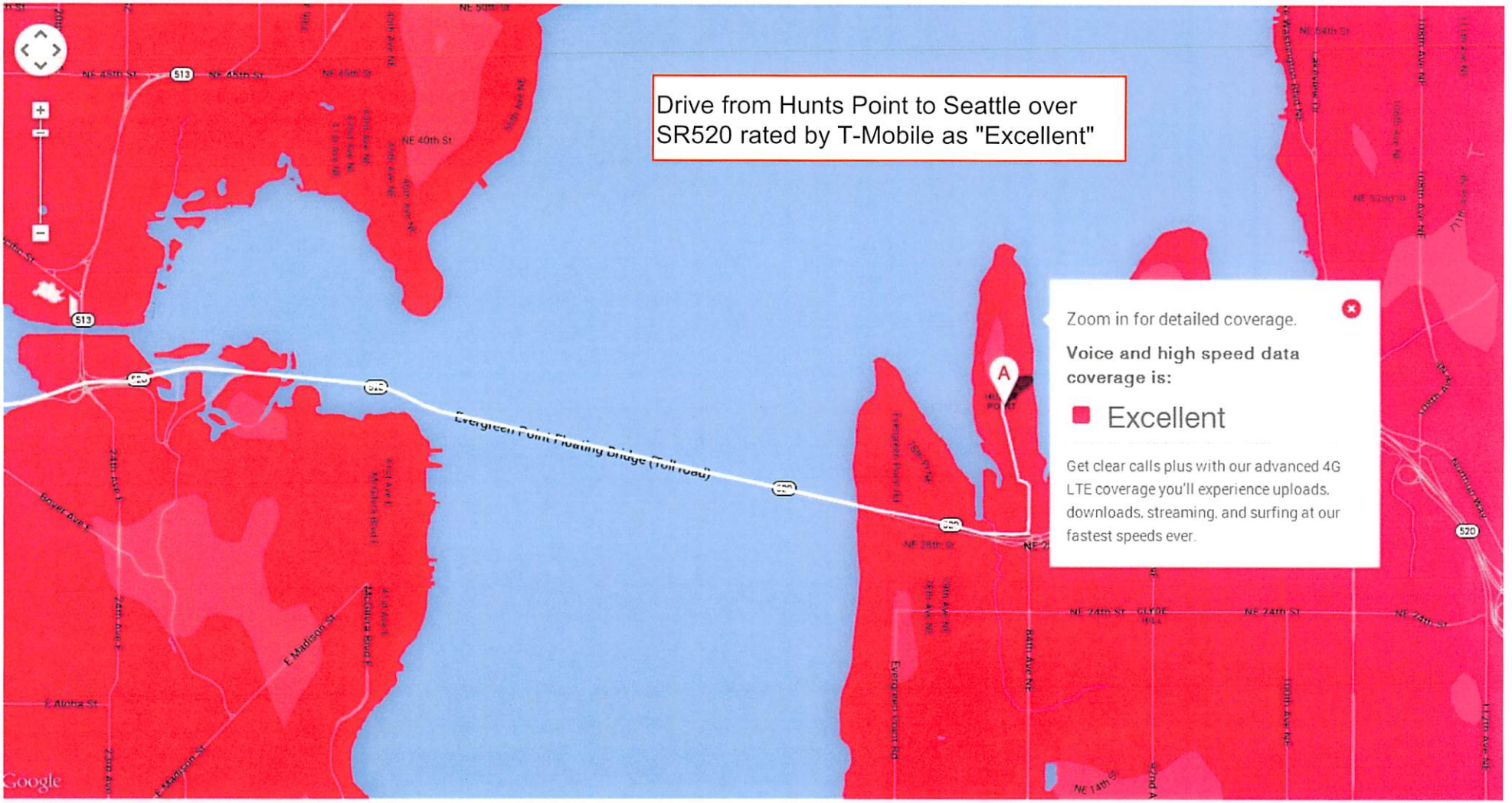
Welcome to the T-Mobile personal site. **Looking for the business site?**

T··Mobile·

SHOP COVERAGE

Find

98039 CHECK COVERAGE Map a route ➤ Map multiple locations ➤



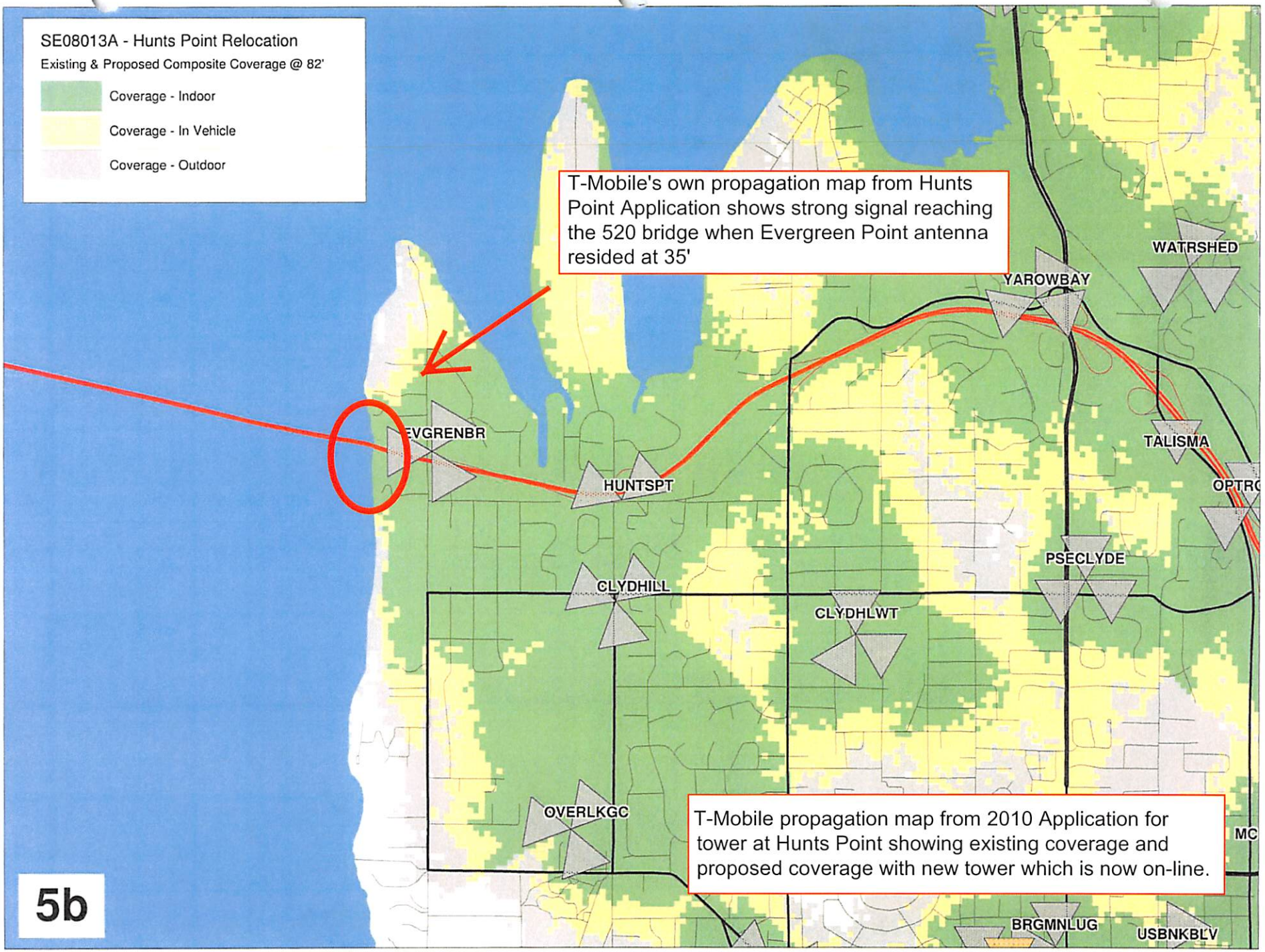
Excellent Very Strong Good Satisfactory 2G Service Partn

Zoom in and click on the map to check signal strength.

The definitions and user experience may differ for dedicated Mobile Internet devices such as Mobile HotSpots, Tablets, and Laptop Sticks. For more details, see a Retail Associate at the nearest T-Mot

MAP INFORMATION: Capable device and qualifying service required for network connection, Wi-Fi calling, and 3G, 4G, and 4G LTE speeds. Roaming and on-network data allotments may differ. Map coverage outdoors, based on a variety of factors, and do not guarantee service availability. Learn more.

Share


SE08013A - Hunts Point Relocation
Existing & Proposed Composite Coverage @ 82'
Coverage - Indoor
Coverage - In Vehicle
Coverage - Outdoor
T-Mobile's own propagation map from Hunts Point Application shows strong signal reaching the 520 bridge when Evergreen Point antenna resided at 35'
WATRSHED
YAROWBAY
EVGRENBR
HUNTSPT
TALISMA
OPTRC
PSECLYDE
CLYDHILL
CLYDHLWT
OVERLKGC
T-Mobile propagation map from 2010 Application for tower at Hunts Point showing existing coverage and proposed coverage with new tower which is now on-line.
MC
BRGMNLUG
USBNKBLV
5b

Attachment 7

SUBMISSION FROM CYNTHIA F. ADKINS AND JOHN F. HARRIS

City of Medina & Independent Towers/T-Mobile
PL-13-031 (SUP), PL-13-032 (Variance), and PL-13-033 (SEPA)
July 16, 2014

VARIANCE FROM 500 FOOT REQUIREMENT SHOULD BE DENIED

MMC 20.37.070(B)(4) requires that all wireless communication facilities be set back at least 500 feet from the property line of all residential properties. The Applicant has requested a variance to construct a wireless communication facility within 466 feet of 23 residential properties, and that variance must be denied because:

(1) the Applicant has failed to provide sufficient evidence to support a conclusion that the proposed wireless communication facility will not be materially detrimental to the public welfare or injurious to the property or improvements in the area;

(2) the requested variance would be a use variance and therefore would be a special privilege prohibited by law;

(2) the Applicant has failed to provide sufficient evidence (such as a surveyor's report) to support its claim that there are no locations for siting a wireless communication facility that are within the nonforested areas of the Fairweather Nature Preserve, adjacent to the state highway right-of-way and 500 feet or more away from residential properties, and therefore there is insufficient evidence to support a conclusion that the set back is a material hardship that cannot be relieved by any other means; and

(4) the Applicant has failed to provide sufficient evidence to support a conclusion that the variance requested is the minimum necessary to provide reasonable relief.

Impact/Detrimental: The City Staff report is misleading when it calls out in Note 35 only three residential properties that are within 169, 275 and 350 feet, respectively, of the industrial facility. To properly frame the impact of this industrial facility on the nearby residential properties, and the impact of any variance, the relevant information is that the proposed industrial facility would be within 170 feet of the nearest residential property, within 200 feet of four residential properties, within 300 feet of 11 properties, within 400 feet of 20 properties, and within 466 feet of 23 properties. It is directly across the street from and in permanent, naked line-of-sight of two properties. It negatively impacts the view shed for many of the other impacted properties and for all of the homeowners and visitors to the North Point neighborhood, and for every visitor to Fairweather. It will be a permanent industrial aesthetic blight on our neighborhood.

Furthermore, the installation of an industrial facility on our grassy playfield that is used by children daily to practice sports, enjoy nature, etc., would be materially detrimental to the welfare and safety of those children and any other visitors to the park. The grassy playfield is currently in its natural state, with no industrial hazards to the children or other visitors. If

the industrial facility is installed, the children and other visitors will be exposed to risk of injury and death because of the numerous industrial hazards fundamental to the facility, including if the tower collapses or falls, if the tower or batteries explode or catch fire, if the repair trucks hit a child, etc. The Applicant has failed to adequately disclose the risks to the public welfare (such as disclosing the fall zone for the proposed tower, typically 100-150% of the tower height, or, in this case, 80-160 feet), and has failed to provide adequate assurances on how it will protect the public from these risks. The variance must be denied because it would be materially detrimental to the public's health and safety.

Special Privilege: The variance must be denied because **Fairweather Park** is not zoned for wireless communication facilities – only the nonforested areas of the **Fairweather Nature Preserve**, that are **adjacent** to the state highway right-of-way, are zoned for wireless communication facilities. The proposed site is in Fairweather Park, not Fairweather Nature Preserve, plus the proposed facility is not adjacent to the highway right-of-way, and, therefore, any variance from the 500-foot setback would be a use variance, and use variances are special privileges that are prohibited by law. Therefore, the variance must be denied.

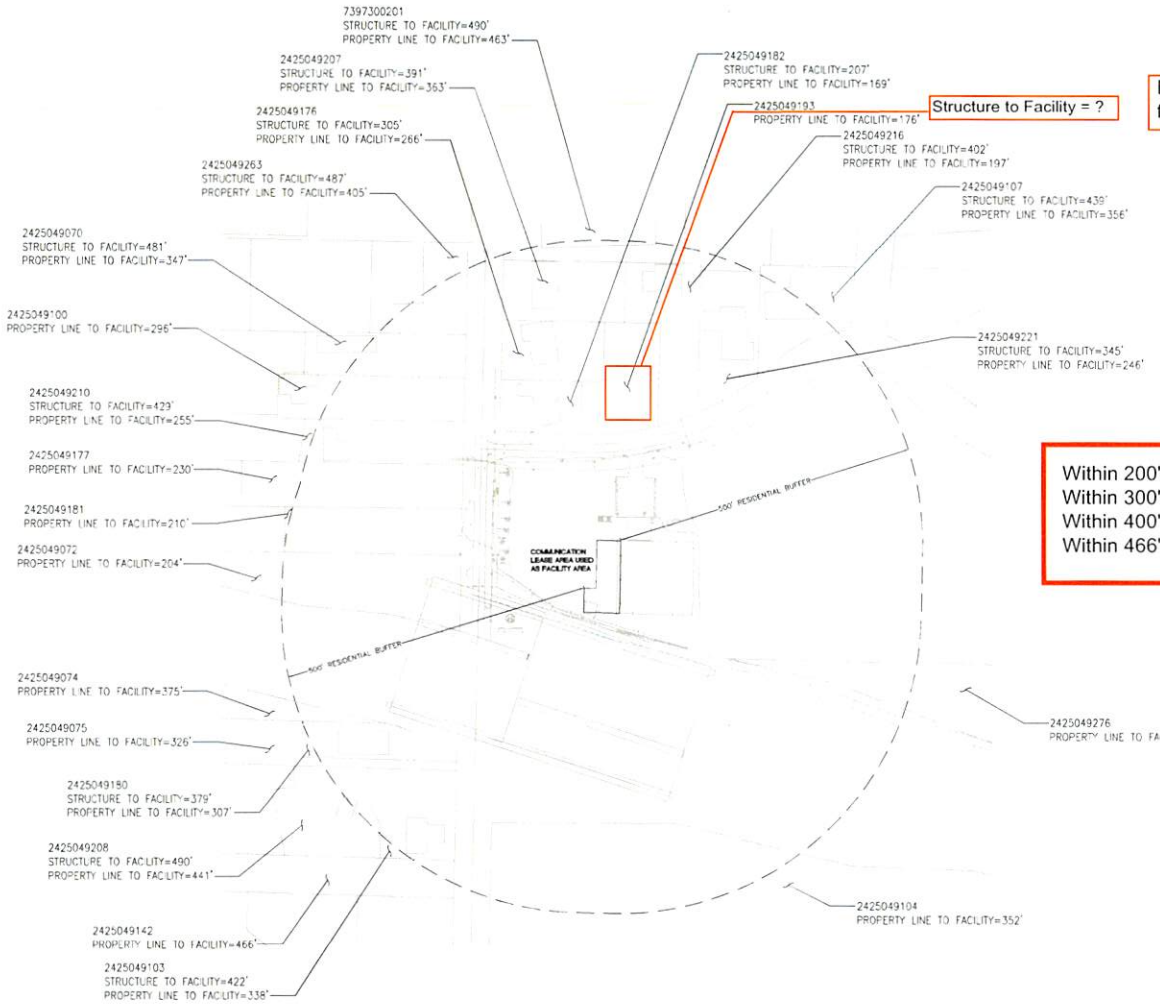
(2) The Applicant and the City have failed to submit adequate relevant information (such as an independent surveyor's report) to support their conclusory claims that there are no locations for siting a wireless communication facility that are within the nonforested areas of the Fairweather Nature Preserve, adjacent to the state highway right-of-way and 500 feet or more away from residential properties.

Because the record lacks adequate information to support their conclusory claim, there is insufficient evidence to support a conclusion that the set back is a material hardship that cannot be relieved by any other means or that this variance is necessary because of special circumstances.

Prior to accepting the Applicant and the City's conclusions as fact, the Hearing Examiner should require that the Applicant submit sufficient evidence (such as an independent surveyor's report) that there are no locations in this general vicinity that are 500 feet away from Medina residential properties that T-Mobile could use to provide adequate wireless communication coverage to residents and visitors. Areas that could be possible permissible sites include the golf course, within the WDOT right of way on the southeast portion of the new Evergreen Point lid, and on the SE portion of the nonforested area in the Fairweather Nature Preserve (whether within or outside of the WSDOT right-of-way), as well as locations outside of the city limits.

Minimum Necessary. Even if all of the other variance criteria were satisfied, this requested variance fails because the Applicant has failed to submit adequate information to support their conclusion that this requested variance is the minimum necessary in order for T-Mobile to provide adequate wireless communication services. T-Mobile has applied for and been granted variances in the past to install its antennas on light standards and utility poles in this general vicinity, but the justification that supported those variances was that all sites were within the WSDOT right-of-way (not on the grassy playfield and in fact completely outside of the park), the structures that were chosen were light standards and utility poles (not new cell towers), and the location that were chosen were picked, according to T-Mobile's own testimony in those situations, because of the potential for minimizing impacts to the nearby residential properties, such as by siting their antennas on light poles in the area that had existing vegetation and trees that would screen the poles, and at a location where the residential properties were oriented away from the poles.

For all of the foregoing reasons, the variance must be denied.



Structure to Facility = ?

Diagram omits distance for house closest to facility.

Within 200' of 4 properties
Within 300' of 11 properties
Within 400' of 20 properties
Within 466' of 23 properties

NOTE:
LEASE AREA LEGAL DESCRIPTION INFORMATION WAS OBTAINED FROM DRAWING TITLED; "EASEMENT EXHIBIT COMMUNICATION SITE LEASE AREA A PORTION OF SECTION 24 T.25N., R.04E., W.M. CITY OF MEDINA, KING COUNTY, WASHINGTON" BY DAVID EVANS AND ASSOCIATES INC. DATED 11-14-11

BASEMAPPING INFORMATION WAS OBTAINED FROM AERIAL IMAGERY AND A SURVEY PROVIDED BY INDEPENDENT TOWERS HOLDINGS, LLC.

CALLED NORTH

1 OVERALL SITE LAYOUT
SCALE:

GRAPHIC SCALE
200' 100' 0 100' 200'
SCALE (11x17): 1" = 200'-0"
SCALE (22x34): 1" = 100'-0"

INFINIGY
Design. Build. Deliver.
1033 Watervliet Shaker Rd
Albany, NY 12205
Office # (518) 690-0790
Fax # (518) 690-0793

No.	Submittal Revision	Appd	Date
8	REVISED PER COMMENTS	ASK	6/24/14
7	REVISED PER COMMENTS	MJB	4/16/14
6	REVISED PER COMMENTS	SKB	4/8/14
5	REVISED PER COMMENTS	MJB	01/17/14
4	REVISED PER COMMENTS	JLM	03/3/14
3	ADDED GRADING	MJB	01/13/14
2	REVISED PER COMMENT	MJB	12/19/13
1	REVISED PER COMMENT	JLM	10/30/13

Drawn: MJB Date: 04/19/12
Designed: MJB Date: 04/19/12
Checked: JDS Date: 04/19/12

Project Number
168-155

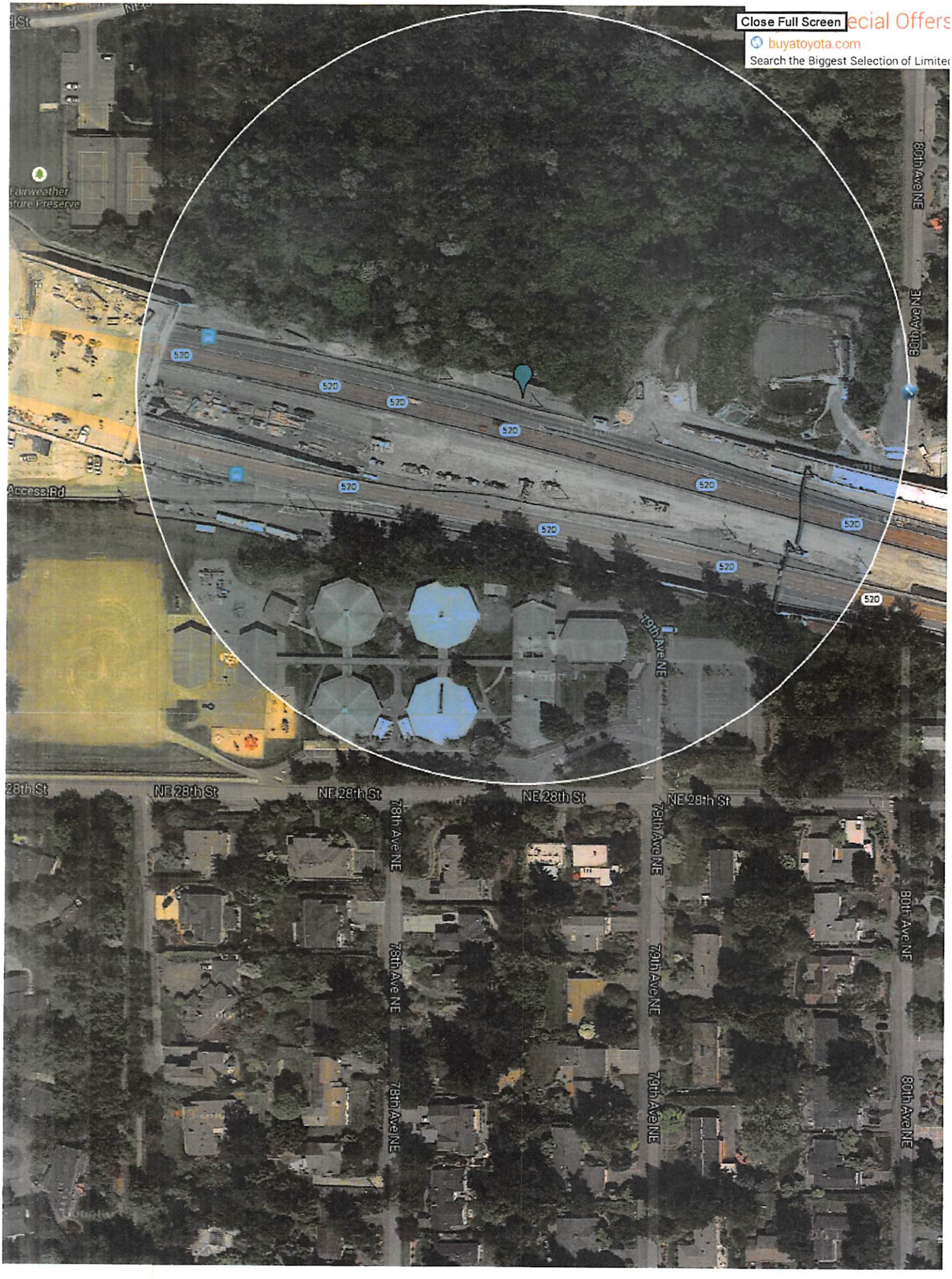
Project Title
MEDINA FAIRWEATHER PARK
IND-155
NE 32ND ST.
MEDINA, WA 98039

Prepared For
INDEPENDENT TOWERS HOLDINGS, LLC

Drawing Title
500' ABUTTERS LAYOUT

Drawing Scale:
Date: 6/24/14
CD

Drawing Number
C2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buyatoyota.com
Search the Biggest Selection of Limited
Fairweather
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80th Ave NE
79th Ave NE
NE 28th St
78th Ave NE
79th Ave NE
80th Ave NE

Attachment 8

Stephen Preston
[redacted]

To: City of Medina Hearing Examiner

Re: PL-13-031 (SUP) and PL-13-032 (Variance)

Dear Sir,

Upon reviewing the City of Medina staff analysis related to the above request for a special use permit and variances, I have noted some errors, misunderstandings, and omissions which I would like to bring to your attention.

Overall I am concerned about three primary issues. First, the city staff analysis does not fully consider the fact that T-Mobile is the only wireless carrier in this application. Although the city recognizes this fact in their analysis, they do not analyze the needs for this proposed facility based on T-Mobile's need alone. Much of the documentation from the applicant, and analysis by the staff, appears to be based on the needs of ITC. ITC builds towers and leases space to carriers. ITC has a financial interest in building a large facility for multiple prospective carriers. ITC's needs are different from T-Mobile and not relevant to the evaluation of this special use permit and variance request. Second, the city staff analysis does not fully consider the requirements of the city ordinance for siting or height requirements of wireless facilities. And, third, the staff analysis does not fully consider the principal of least intrusive implementation. The proposed facility is clearly not the least intrusive option for T-Mobile. The staff analysis seems to assume an imaginary requirement for multiple carriers and therefor a much larger facility than the needs of T-Mobile. In addition, the city's public process for evaluating the impact of this proposed facility did not fully evaluate the impact of all aspects this facility.

In the following paragraphs I provide detailed comments on most of the sections in the staff analysis and recommendation for PL-13-031 (SUP) and PL-13-032 (Variance) dated July 8, 2014. I ask that you consider the following errors, misunderstanding, and omissions in your deliberations of this matter.

Comments on "Part 5 – Staff Analysis" (organized by section of the city's document)

1. No comment
2. Note that T-Mobile is the only real applicant – the only wireless carrier that would need a special use permit or variance. ITC is essentially an agent filing this request on behalf of T-Mobile.
3. No comment.
4. Note that this staff reports lists the western open space of the city owned land as Fairweather Park and the wooded, eastern section, is Fairweather Nature Preserve. The official name of the entire area is Fairweather Park and Nature preserve (as set by the Medina City Council at the January 12, 2004 city council meeting).

5. The city's design options, in fact and as described by the city staff report, only considered the support structure (cell tower) and did not discuss the size, location, or undergrounding of the equipment building. Given the significant size of the equipment area, lease includes over 100'x40', and the location within the active used area of Fairweather Park, why was this aspect of the design left out of the design review? The city's public process reviewed the pole design, not the complete facility design. In addition, the city did not include other less intrusive options in the design review (e.g. siting the permanent facility on the 520 lid as in the original facility, limiting the structure to 45' as in the previous facility.) The city's public process was not a fair or representative process.
6. No comment.
7. No comment.
8. Note that the original T-Mobile facility was located inside the state right-of-way and was not located on city property. The actual height of the antenna on the previous facility, 45', is an important point because it sets an adequate performance standard for the given height. T-Mobile never sought to raise the height beyond 45'. Thus we should conclude that 45' is an adequate height for this location. In addition I will note that the relief from a 500' setback in the original facility was mitigated by the location inside the state right of way, by the lower height (maximum of 55'), by the fact that the antenna was mounted on an existing utility pole, and by the minimal space for the equipment. All of these factors greatly reduced the visual impact of the previous facility.
9. Note that T-Mobile was forced to relocate due to the SR 520 construction. At that time they merely asked for a temporary site until after the construction was finished in this area. In fact, even today, they do not claim to need a different facility. In exhibit 5 T-Mobile says: "The original site, both of the temporary sites, and the final permanent site will provide coverage to west along the 520 floating bridge..." T-Mobile's only comment regarding the height is that it is necessary to provide space for multiple carriers.
10. T-Mobile originally contacted the city about a temporary site in late 2009 or early 2010, as report in the January 2010 city council meeting. ITC did not become involved in this site until later.
11. No comment.
12. No comment.
13. No comment.
14. The staff report does not list the 80' height as a variance. But I question the staff's decision to grant this height request without review. The code only allows the height to go above 35', if the applicant can demonstrate that the additional height is required to provide coverage of SR-520. And T-Mobile has not made any statements to this effect.
15. No comment.
16. At the January 12, 2004 city council meeting, the city council renamed this area of city owned land to Fairweather Park and Nature Preserve. The zoning map labels these areas as "Fairweather Nature Preserve / Park".
17. I see two issues with the staff's analysis here. First, MMC 20.37.060(A)(1) only allows wireless facilities in non-forested areas adjacent to "Fairweather Nature Preserve". As the staff noted in point 4 of their report, the proposed location of this special use permit is located in Fairweather Park. Fairweather Nature Preserve is the eastern area portion of this city owned land which is

maintained in a natural state. I believe this was the intent of the original ordinances in 1996 and 1997. I believe the city defended this definition of the siting requirement in their 2004 court case relating to the original T-Mobile facility. My second issue relates to the requirement that the facility be located "adjacent to" the SR-520 right-of-way. In part 2 of the staff analysis, under "Existing Conditions", the staff says "The lease area is located along the grass hill area between the tennis court and the practice sports field. SR 520 Evergreen Point lid improvements are about 20 feet to the south". The drawings in exhibit 7 show that the building itself would extend another 90' in a direction away from the right-of-way (not including additional landscaping, fencing, concrete, or other modifications related to the facility. Thus, the proposed facility does not begin adjacent to the right-of-way (20 foot gap between the facility and the right of way) and it extends at least 110' away from the right-of-way. Overall, the proposed facility is not "adjacent" to the right-of-way in the context of this city owned land (even if it were located in the Fairweather Nature Preserve instead of Fairweather Park).

18. No comment.
19.
    a. The staff notes that forested areas east of the leased site would provide screening from residential properties. This is the land adjacent to Fairweather Nature Preserve which is actually allowed by the code.
    b. The staff has misquoted the name of the park in the code. The code actually says "Fairweather Nature Preserve" and not "Fairweather Park and Nature Preserve". The staff says "The applicant has provided evidence that the height is necessary for co-location of up to five wireless service provider's antennas and it is necessary to provide service coverage in north Medina and SR 520 (Exhibit 5, Page 2). " But the applicant is T-Mobile... not ITC. T-Mobile, as the true applicant, must demonstrate that the additional height is required to "avoid a significant gap in service coverage on the SR-520 floating bridge". T-Mobile has not demonstrated a coverage gap – much less a "significant gap". And, in Exhibit 5, T-Mobile implies that their previous two facilities were operating without demonstrated issues (at a height less than 55').
    c. According to ITC map, the distances from the facility to the nearby properties, closer than 500', would be: 356', 246', 197', 176', 169', 463', 363', 266', 405', 347', 296', 255', 230', 210', 204', 375', 326', 307', 441', 466', 338', 352', and 196'. Eight properties are within 250' of the facility (half of the required setback).
    d. No comment.
20. This section discusses concealment but postpones the undergrounding discussion/variance to item 38.
    a. No comment
    b. No comment
    c. The staff claims "The wireless communication facility will not be readily visible from a large number of residential properties..." The staff did not determine exactly how many properties. Over 20 properties are within 400' and the tower will probably be visible from these properties. The staff should have been more precise in their review. At 80' the tower would also be visible from many properties along 28th street (distant but visible). All considered these properties should be considered a large number of properties for a small community like Medina. Note again that the city's public process

only considered various design options for 80' towers in the park. The public process did not include options for 45' facilities like the original T-Mobile facility. And the public process did not seek public input regarding the equipment building. The city did NOT review the entire facility or less intrusive design options suited to the actual needs of T-Mobile.

d. Underground requirement – covered in point 38.

e. The code "requires other techniques that prevent the facility from visually dominating the surrounding area." The staff says "The City Council conducted a public process for selecting a design for the wireless communication facility where six options were considered including an artificial tree, an architectural art feature, a monument, a stick and a flagpole." But this only reviewed the options for the pole design and made no mention of the very large equipment facility or its significant visual impact. Nor did the public process consider the original T-Mobile location as an option.

21. "The applicant states that there is a "lack of existing structures upon which to co-locate" (Exhibit 4, page 12)." This exhibit is dated in Aug 2013. On page 12 of exhibit 4 the applicant says "There are currently two temporary facilities located within 1000' of the proposed permanent facility." In item 22 of the staff report, the staff notes that a facility exists 930' away at Bellevue Christian School. This is a permanent facility. There is also another permanent facility located about 2000' away in Hunts Point. The applicant has not demonstrated that these facilities do not meet the needs of T-Mobile.

22. MMC 20.37.110 (B) says the applicant must demonstrate a good faith effort toward co-locating with existing structures. And MMC 20.37.110 (C) says they must show good faith by demonstrating the points in MMC 20.37.110 (C). The sub-points of MMC 20.37.110 (C) refer to engineering requirements, structural requirements, and electrical interference. However, the staff analysis incorrectly applies the code and evaluates this section using service coverage in place of engineering (physical and electrical design) concerns. Overall the staff has inaccurately claimed that T-Mobile cannot co-locate anywhere nearby while admitting they T-Mobile IS co-locating in Hunts Point.

    a. Regarding Bellevue Christian the staff report says "The existing facility area has no opportunities for co-location due to space constraints, is restricted in height, and therefore cannot sufficiently support the proposed facility." The staff has not provided any evidence in support of space constraints at this facility. Regarding the tower in Hunts Point, the staff says: "The Hunts Point facility is approximately 97 feet tall. The support structure currently houses T-Mobile; however, the service area from this facility towards Medina is limited westward due to topographic differences (Exhibit 5, page 2). The Hunts Point facility is at an elevation of approximately 50 feet, whereas the Fairweather site has an elevation of approximately 125 feet (Exhibit 17, page 1). This height difference prevents sufficient coverage area necessary for the northern portion of Medina and along the floating bridge (Exhibits 5 and 17)." This conclusion is totally irrelevant to the purpose of this section of the code. In section MMC 20.37.110 (C) the applicant must demonstrate that the existing facility does not have the electrical or mechanical attributes for co-location of a T-Mobile facility. Obviously this is not true since the staff report admit that T-Mobile is locating in the Hunts Pt tower. Instead the

staff analysis talks about limited service coverage and this is not an engineering concern in the context of this section of the code.

b. Again the staff report misuses the engineering requirement. The code only asks if the structure is tall enough to physically hold the applicant's antenna. Service coverage does not apply to this section of the code and the staff only talks about service coverage here.
c. No comment.
d. No comment.

23. MMC 20.37.110(F) says "The City may require new support structures to be constructed so as to accommodate future co-location, based on expected demand for support structures in the service area,..." The staff merely says the structure can support additional, imaginary, carriers. Neither the applicant nor the staff demonstrates "expected demand for support structures in the service area.". In fact, Verizon dropped out of this location. ATT has stated that the existing Hunts Point tower serves their needs. And T-Mobile's original location served their needs. There is no demonstration of additional demand. Alternatives do exist in the area: the Hunts point tower, Bellevue Christian School, and the existing 520 lid can provide support for additional antennas. So the applicant has not demonstrated a need for additional structures based on a lack of existing structures or likelihood of increase demand. The staff report does not provide adequate analysis on this point.

NEEDS Analysis

Points 24 through 28 related to MMC 20.37.140 "Requirement to demonstrate need for facility". There are two points to consider here: need and least intrusive.

The code requires that the applicant demonstrate "The need for the carrier providing the personal wireless services to complete a network of local or regional services." There is no language saying that coverage gaps or weak service is sufficient to demonstrate "need" in the context of this section of the code. However, the staff analysis only talks about service gaps and improvements in coverage. Unless there is some precedent otherwise, I would argue that they are talking about the wrong requirement for this section of the code. As already mentioned above, in Exhibit 5, T-Mobile implies that their original location was sufficient. So I must conclude that T-Mobile has not established a need for a different facility.

In point 26 the staff says "Then cylindrical design with a light selected through a public process is considered to be the least intrusive type of facility on the community". Once I age, I refute this statement by noting that the public process did not discuss the support equipment facility and the public process did not compare the proposed facility to the original facility. The analysis must be the least intrusive option for T-Mobile's facility because T-Mobile is the only applicant. And T-Mobile's statement implies that they had adequate coverage with their original shorter tower and un-obtrusive equipment (before the 2010 move to a temporary location).

Radio Frequency standards

No comments on points 29 to 33 at this time.

35. Variance from 500ft setback. The staff analysis says "The applicant states that "the topography, location and surroundings also limit the uses for which the property is zoned because there is no place within the non-forested area of Fairweather Nature Preserve which could possibly meet the 500 foot set back from residential property lines" (Exhibit 31, page 6)." This exhibit merely repeats someone else's statement from a court case. They do not provide a map demonstrating this assertion. In 1997, when the original ordinance was enacted, the city engineer, Greg Hill, produced a map showing that the 500' setback allowed siting in non-forested area of Fairweather along the 520 corridor and across from Bellevue Christian School. We suggest that the city refer to the former city engineer's map. And we further note that this area was defined as the only permitted location in Fairweather Nature Preserve because it is well shielded from the view of residents. The city council never envisioned that the open space of Fairweather Park would be a permitted location for wireless facilities (the same guideline as the other open space city parks).

36. Staff says: "T-Mobile also stated that the requirement for coverage in this area has not changed and that the proposed facility is needed at this location to complete the network of local and regional services (Exhibit 5)." But T-Mobile does not claim that the leased acreage is the only site which will suffice. T-Mobile essentially claims the previous and temporary locations work just as well as the current proposed site. In exhibit 5, T-Mobile says "The original site, both of the temporary sites, and the final permanent site will provide coverage to west along the 520 floating bridge...". Fairweather Nature Preserve was never zoned for cell sites – only the right of way near 520. T-Mobile also does not claim that the need more height that the original 45' antenna location. In exhibit 5, T-Mobile says "With respect to the multi-carrier stealth pole, it should be noted that the 80 foot height of the pole is required in order to allow multiple carriers to co-locate their antennas at the site location." Basically, in exhibit 5, T-Mobile asserts that they need to replace their previous site. T-Mobile does not make any argument for moving from their previous location on the 520 lid to a location in the park. And they do not make any argument for increasing the height of their antenna.

37. no comment.

38. ...

39. T-Mobile is the only applicant for this permit. T-Mobile has not demonstrated a need for a large multiple bay equipment facility? In their original facility T-Mobile's equipment was appropriately sized for a single carrier. T-Mobile should not argue for a variance from undergrounding in a very open public park by asserting that they need a much larger building than necessary to host other prospective carriers. Part c says the location must not interfere with existing uses of public land. This play area in Fairweather Park is frequently used for soccer, football, and lacrosse practices. If the installation of the building restricts access to any of the field, it will interfere with the existing uses. Therefore, the applicant must not install any fences or walls which would reduce the accessible area of the playfields. And the applicant has not provided enough detail in their designs or made any written assurance which would demonstrate this point.

Comments on "Part 6 – Conclusions"

1. No comment.
2. ...
    a. "The use complies with the adopted goals and policies set forth in the comprehensive plan."
        i. The comprehensive plan includes a parks and open space section. This section includes the following goals.
        ii. PO-G1: "To maintain and enhance Medina's parks and open spaces to meet the City's needs"
        iii. PO-G2: "To expand the total acreage of City parks and open spaces..."
        iv. PO-P6: "The City should retain the Fairweather Nature Preserve in its natural state and provide maintenance only when necessary".
        v. The proposed facility directly conflicts with these goals. The cell tower itself will take open space and visually create a loss of open space.
        vi. The applicant's response fails to mention the parks and open spaces section of the comprehensive plan.
        vii. The staff analysis also fails to refer to the parks and open spaces section of the comprehensive plan.
    b. "The use is designed to minimize detrimental effects on neighboring properties".
        i. In locating the facility the applicant has not attempted to minimize detrimental effects. The proposed facility is much larger and more visually intrusive than required to site the one wireless carrier involved in the permit application. The applicant has chosen a central location which extends almost to the middle of the park. The applicant proposes to build a facility which is much higher than needed for the use. The applicant proposes an equipment building which is much larger than required for the intended use.
        ii. The applicant's statement does not demonstrate a need for the proposed location versus other less intrusive options. The applicant's proposal does not demonstrate a need for the size of the proposed equipment building. The applicant's response assumes these two key mitigations as non-negotiable.
    c. "The use satisfies all requirements specified for the use."
        i. Rebuttal of applicant response
            1. Part a. MMC 17.90.50 Permitted locations. The applicant states that the project is located in Fairweather Park. Fairweather Park is NOT a permitted location under MMC 20.30.050 and 20.30.060.
            2. Part b. The proposed location is located in Fairweather Park and not in Fairweather Nature Preserve. The proposed location is not "... adjacent to the state highway right-of-way ..." as required in the code. The proposed location does not meet the site requirement.
            3. Part c. The 80' height limit requires that the application demonstrate a need for this height to provide coverage for the 520 bridge. Contrary to the applicant's assertion, T-Mobile's documentation does NOT claim a need for the 80' height. Instead T-Mobile says that the previous permanent facility provided equivalent coverage and that facility's antenna was only 45' high. From exhibit 5: "The original site, both of

the temporary sites, and the final permanent site will provide coverage to west along the 520 floating bridge..." T-Mobile's only comment regarding the height is that it is necessary to provide space for multiple carriers. And since this application includes only one carrier, there is no need for this increased height limit. The applicant claims there are no locations of Fairweather Nature Preserve located more than 500' from a residential property line. However, the applicant merely references statements from others and does not provide a map or other evidence establishing this claim. As referenced above in this document, the city possesses contrary evidence from the city engineer's maps in 1997.

4. Part e. Concealment. The proposal requires a variance because their proposed equipment building does NOT meet the requirement for undergrounding.
5. Part f. Co-location. The only wireless carrier is T-Mobile and T-Mobile has not demonstrated a good faith effort to co-locate. T-Mobile's previous facility was co-located on a utility pole on the 520 lid. T-Mobile could use the same approach now.
6. Part g. Demonstrated need. T-Mobile has stated that the current temporary locations are equivalent to the previous permanent facility. The WSDOT has stated that carriers may co-locate on the new lid, T-Mobile could install a facility on the lid – similar to their original permanent facility. The applicant has NOT demonstrated a need to use the proposed NEW (and more impactful) location.

d. "The use complies with all applicable zoning and development standards and requirements."
   i. The applicant has not demonstrated a need for additional height beyond 35'. So the 80ft tower height does not meet the zoning height limit of 35'
   ii. The proposal requires a 169' setback instead of the 500' setback in the code.
   iii. The proposal does not meet the requirement for undergrounding of the equipment.
   iv. The proposed location is not adjacent to the SR-520 right-of-way and is not located in Fairweather Nature Preserve. Therefore the proposed location does not meet the siting requirement of the code.

e. "The use will have no materially detrimental effects on neighboring properties due to excessive noise, lighting, off-site traffic generation or other interferences with the peaceful use and possession of said neighboring properties."
   i. The tower will interfere with the current recreational use of the park by reducing the area available for sports such as soccer and lacrosse.
   ii. I believe that the equipment building will eventually require more fencing, for insurance purposes, and will therefore additionally reduce the area of the playfield. The applicant's drawings of this installation are preliminary and conceptual. And the applicant has not made any written promises concerning fencing or other aspects of the equipment building. Therefore the applicant has not demonstrated the full impact of the facility.

3. Really section 4 (staff report skipped section 3). This section analyses several aspects of the variances. For now I'm going to comment on each variance in general without arguing directly to the subsection requirements.
    a. 500 setback. T-Mobile received a variance for the 500' setback in 2004. However, the 2004 T-Mobile facility was only an antenna located 45' high on an existing utility pole. And T-Mobile's original facility was located in the 520 right of way (state property). T-Mobile's original facility was not located in a city "Park or Public place". This applicant proposes a new 80' tower in a much more visible area or a city park and their equipment extends much further into the 500' setback than the T-Mobile facility. The code describes permitted locations as "adjacent to the state highway right-of-way". The proposed facility is not located in Fairweather Nature Preserve. The proposed location extends far into Faiweather park and cannot be considered to be "adjacent" to the state highway right of way. Therefore they are requesting special treatment when asking for a variance from the 500' setback, a variance from locating in Fairweather Nature Preserve, and a variance from the need to be adjacent to the right of way. The impact of the proposed new facility is much greater than the original T-Mobile facility. The applicant (T-Mobile) has not demonstrated a need for the more intrusive new tower or demonstrated a need for an equipment facility of the proposed size. Asking for a more reduced setback is asking for special treatment.
    b. Undergrounding the equipment. The proposed equipment facility is larger than required. The applicant should not oversize their facility as an excuse to avoid the expense of concealing their equipment underground. In addition, if the equipment is sized for the existing single carrier (T-Mobile), the equipment can be located in the original T-Mobile location on the 520 lid or actually adjacent to the right of way – as comprehended in the permitted sites language.

Thank you for your consideration in this matter,

Stephen Preston

Attachment 9

Fairweather Tower Design Options

WHAT? The City is seeking public input on tower design options for a wireless communication facility at Fairweather Nature Preserve. The City has agreed to lease an area west of the tennis courts near SR 520 to Independent Towers.

WHAT ARE THE OPTIONS? Six design options include: (1) Flag Pole; (2) Stick; (3) Architecture Feature; (4) Artificial Tree; (5) Light Pole for the Sports Field; and (6) Monument.

HOW TO COMMENT: Please visit the City's website or contact City staff below for more information. We are seeking comments by the next Council meeting June 13th.

CITY WEBSITE: http://www.medina-wa.gov

QUESTIONS: Contact Robert Grumbach at (425) 233-6416, or email rgrumbach@medina-wa.gov.

- There was no meaningful public notice regarding the permanent nature, size or scope of the project.
- This is not notice of a permanent industrial cell tower complex. This is a flier focused on soliciting input on "design options" and positions the lease as something the City has already agreed to.
- The flier as presented to Hearing Examiner is misleading as it suggests that the postcard was accompanied by the four 8.5x11 photos as a part of the mailing. It was not.

SUBMISSION FROM CYNTHIA F. ADKINS AND JOHN F. HARRIS

attachment 10

City of Medina & Independent Towers/T-Mobile
PL-13-031 (SUP), PL-13-032 (Variance), and PL-13-033 (SEPA)
July 16, 2014

Comments regarding Determination of Nonsignificance (DNS) issued July 1, 2014 in PL-13-033 (SEPA), Dan Schweigard of Independent Towers (Agent)

Although we chose not to file an appeal of the DNS, the wireless communication facilities law under the Medina code include many provisions related to the environment, including aesthetics. MMC 20.37.070(B), MMC 20.37.100, etc., and so we wanted to point out a few items.

Errors in findings of fact in City's Determination:

Paragraph #3: Area specified for structure is "775 square foot (25 feet by 61 feet)…". This is inaccurate. 25 feet by 61 feet equals 1,525 sq. ft., not 775 sq. ft.

Paragraph #4: Area specified for lease is "5,400 square feet of the 10.4-acre park (about 1.2 percent)". More relevant is that 5,400 square feet is approximately 15% of the un-forested grassy field area.

Paragraph #9: 775 square feet cited once again as footprint of structure – which is in conflict with the dimensions given in Paragraph #3.

Faxed to Matt Cagan
6/8/10
Attachment 11

Town of
Serving Our Residents
Hunts Point

3000 Hunts Point Road
Hunts Point, WA 98004-1121
425.455.1834 fax 425.454.4586
www.huntspoint-wa.gov

June 3, 2010

Matt Cagan
Cascadia PM, for Verizon Wireless
8760 122nd Ave. NE
Kirkland, WA 98033

RE: Corrected Findings, Conclusions & Decision on Special Use Permit #09-01

Dear Mr. Cagan:

Enclosed are the Findings, Conclusions and Decision on the Special Use Application #09-01 that was before the Hearing Examiner on May 18, 2010. The request for a Special Use Permit to replace an existing 77 foot tall Clearwire cellular tower with a new wireless communication facility, including a 97-foot tall cellular tower, at 3000 Hunts Pont Road, in Hunts Point, Washington is **DENIED**, without prejudice. The Applicant did not submit sufficient evidence to allow the Hearing Examiner to make a legally defensible decision supported by substantial evidence.

If you have any questions, please do not hesitate to call me.

Sincerely.

Sue Israel
Deputy Clerk

Encl.

Cc: Mona Green, Town Planning Consultant
Derrick Priebe, Telco Pacific, for T-Mobile
Chris Martin, T-Mobile (Nexius)
Heather Smith
Dave Bocek

Derrick Priebe
T-Mobile (Telco Pacific)
19807 Northcreek Pkwy N.
Bothell, WA 98011

Matt Cagan
Verizon Wireless/CPM
8760 122nd Ave. NE
Kirkland, WA 98033

[redacted]

Chris Martin
T-Mobile (Nexius)
19807 North Creek Pkwy
Bothell, WA 98011

BEFORE THE HEARING EXAMINER
FOR THE TOWN OF HUNTS POINT

In the Matter of the Application of	)	No. 09-01
	)	
Verizon Wireless, T-Mobile, and Clearwire US, LLC	)	**Cell Tower and Wireless Communication Facility**
	)	
	)	FINDINGS, CONCLUSIONS
For a Special Use Permit	)	AND DECISION

SUMMARY OF DECISION

The request for a Special Use Permit to replace an existing 77-foot tall Clearwire cellular tower with a new wireless communication facility, including a 97-foot tall cellular tower, at 3000 Hunts Point Road, in Hunts Point, Washington is **DENIED**, without prejudice. The Applicant did not submit sufficient evidence to allow the Hearing Examiner to make a legally defensible decision supported by substantial evidence.

SUMMARY OF RECORD

Request:
Matt Cagan, Cascadia PM, for Verizon Wireless; Derrick Priebe, Telco Pacific, for T-Mobile; and Edward Hill for Clearwire US, LLC request a Special Use Permit to replace an existing 77-foot tall Clearwire cellular tower with a new wireless communication facility, including a 97-foot tall cellular tower. The wireless facility would be located adjacent to the Town of Hunts Point tennis courts, at 3000 Hunts Point Road, in Hunts Point, Washington.

Hearing Date:
The Town of Hunts Point Hearing Examiner held an open record hearing on the request on May 18, 2010.

Testimony:
The following individuals presented testimony under oath at the open record hearing:

Mona Green, Town Planner
Matt Cagan, Cascadia PM, for Verizon Wireless
Derrick Priebe, Telco Pacific, for T-Mobile
Heather Smith
Dave Bocek

Exhibits:
The following exhibits were admitted into the record:
1. Application and Project Narrative, received December 3, 2009

2. Project Correspondence: Email message from Mona Green to Matt Cagan and Derrick Priebe, sent December 24, 2009; Applicant Response, dated February 10, 2010; Email message from Mona Green to Matt Cagan and Derrick Priebe, sent February 17, 2010; Applicant Response, dated February 22, 2010; Bellevue Fire Department Proposal Approval, dated March 17, 2010
3. Photo simulations of existing conditions and conditions with proposed project, undated
4. Plan Set, with Title Page dated February 2, 2010
5. Agreement to Comply with HPMC 18.43.007(2)(c)(i) & (ii), (k), and (l), Clearwire US, LLC, dated November 25, 2009; Co-Location Agreement, Clearwire US, LLC, dated June 7, 2006
6. T-Mobile USA SE08013A Hunts Point Relo/Clearwire Existing Coverage Map, Proposed Coverage Map; Verizon Wireless existing and proposed coverage Plot Map; Clearwire SEA552 Coverage 75' ACL and 95' ACL Maps
7. King County Assessor Real Property Records, Legal Description, obtained February 17, 2007
8. FCC Wireless Telecommunications Bureau Radio Station Authorization, Registration No. 0001565449, Expires April 28, 2017; FCC Cellular License, License No. 0001581305, Expires October 1, 2014
9. Non-Ionizing Electromagnetic Field Exposure Analysis and Engineering Certification for Verizon Wireless, dated November 2009; Non-Ionizing Electromagnetic Field Exposure Analysis and Engineering Certification for T-Mobile, dated November 23, 2009
10. FAA Structure Notice Requirements, obtained November 25, 2009
11. SEPA Checklist, dated February 10, 2010
12. SEPA Optional Determination of Nonsignificance (DNS) Notice Materials, dated April 13, 2010
13. Notice of Public Hearing, dated April 15, 2010
14. Town Staff Report, dated May 13, 2010
15. State Route 520 Urban Design Criteria, undated
16. SEA Hunts Point RF Justification, Verizon Wireless Network Engineering
17. Radio Frequency Engineer Site Analysis, T-Mobile Project No. SE08013A, dated May 17, 2010
18. SEPA Determination of Nonsignificance, dated May 20, 2010

The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

1. Matt Cagan, Cascadia PM, for Verizon Wireless; Derrick Priebe, Telco Pacific, for T-Mobile; and Edward Hill for Clearwire US, LLC request a Special Use Permit (SUP) to replace an existing 77-foot tall Clearwire cellular tower with a new wireless communication facility, including a 97-foot tall cellular tower. The wireless facility would be located adjacent to the Town of Hunts Point (Town) tennis courts, within the

Town of Hunts Point Park, at 3000 Hunts Point Road, in Hunts Point, Washington.[1] *Exhibit 1; Exhibit 14, Staff Report, page 1.*

2. The Town received the SUP application on December 3, 2009 and determined the application was complete on April 6, 2010. *Exhibit 1; Exhibit 13.* The Town mailed and posted notice of the application and associated open record hearing as required by Town ordinances. The Town published notice of the application and hearing in the *Seattle Times* on April 15, 2010. *Exhibit 13.*

3. The Town analyzed the environmental impact of the proposed SUP, as required by the State Environmental Policy Act (SEPA), Ch. 43.21C RCW. On April 13. 2010, the Town gave notice that it would likely issue a Determination of Nonsignficance (DNS) for the proposal according to Washington Administrative Code (WAC) Section 197-11-355 Optional DNS Process requirements.[2] At the open record hearing on the proposal, Town Planner Mona Green testified that the Town received no comments on the likely DNS, that the SEPA comment period ended on the date of the hearing on May 18, 2010, and that any comments about the likely determination made during the hearing would be made part of the SEPA record. The Town issued a final DNS determination on May 20, 2010. No SEPA appeals were filed as of the date of this Hearing Examiner decision.[3] *Exhibit 12; Exhibit 18; Testimony of Ms. Green.*

4. The Applicant proposed replacing an existing 77-foot tall, 18-inch diameter Clearwire cellular tower on the subject property adjacent to Town tennis courts[4] with a new 97-foot tall, 36-inch diameter wireless tower, which is depicted as a "stealth antenna mast" on proposed site plans. The existing Clearwire cellular tower and associated concrete footing would be removed immediately upon construction of the proposed tower. The Clearwire equipment box would remain in place. *Exhibit 1; Exhibit 4; Exhibit 14, Staff Report, page 1.*

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[1] The property subject to the request is identified by King County Assessor Tax Parcel No. 0540100726. A legal description of the subject property is found within the proposed wireless facility site plan maps. *Exhibit 4; Exhibit 7.*

[2] According to WAC Section 197-11-355, if a GMA county or city with an integrated project review process (RCW 36.70B.060) is lead agency for a proposal and has a reasonable basis for determining significant adverse environmental impacts are unlikely, it may use a single integrated comment period to obtain comments on the notice of application and the likely threshold determination for the proposal. If the process is used, a second comment period will typically not be required when the DNS is issued. If a DNS is issued, the lead agency shall send a copy of the DNS to the department of ecology, agencies with jurisdiction, those who commented, and anyone requesting a copy. *WAC 197-11-355.*

[3] The appeal period is due to end June 3, at the time this decision is scheduled to be issued. If an appeal is filed prior to release of this decision, this application hearing shall be continued until an appeal of the DNS can be heard and decided.

[4] The Town Hearing Examiner approved a Special Use Permit (SUP) for the existing cellular tower by Hearing Examiner Decision No. SUP-06-01, issued March 13, 2007.

5. The proposed wireless tower would provide antenna space serving four total service providers: Verizon Wireless; T-Mobile; Clearwire US, LLC; and a future tenant yet to be determined. The proposed tower would conceal four antennas, one for each service provider and one for a future tenant. The tower would not be supported by guy wires. *Exhibit 4; Exhibit 14, Staff Report, pages 1 and 10.*

6. The Applicant would also construct a new equipment shelter adjacent to the northwest of the proposed antenna. The proposed equipment shelter would remain locked from the public at all times. Matt Cagan testified for the Applicant that proposed equipment shelter dimensions would be 66-feet-by-11-feet-by-10-feet, for a total area of 726 square feet. Mr. Cagan testified that the proposed shelter size differs from the standard equipment shelter size of 26-feet-by-11-feet-by-10-feet because the additional approximately 40 feet in length is necessary to provide space addressing the needs of T-Mobile and the future tenant. According to the Town Staff Report, Verizon would use approximately 250 square feet, T-Mobile would use approximately 190 square feet, a future tenant could use up to 175 square feet, and space has also been set aside for an electric generator within the proposed equipment shelter. Mr. Cagan added that the subject property currently contains an existing equipment shelter used to store Clearwire equipment that would be retained following construction of the proposed tower. The existing shelter is approximately 121 square feet in size and adjacent to the southeast of the proposed tower, as depicted on proposed site plans. *Exhibit 4; Exhibit 14, Staff Report, pages 7 - 8; Testimony of Mr. Cagan.*

7. Hunts Point Municipal Code (HPMC) Section 18.43.007(1) provides that a wireless service facility less than 26 feet in height is permitted within the Town with a site development permit obtained under Ch. 15.45 HPMC. *HPMC 18.43.007(1).* A Special Use Permit (SUP) is required for wireless service facility installation when the proposed facility would exceed 26 feet in height. The Town Staff Report states that the proposed equipment shelter would exceed 200 square feet, the maximum equipment shelter floor area as established in HPMC 18.43.008(8)(a) and the proposed wireless facility would exceed 26 feet in height; thus a SUP is required. The Town Staff Report also states that the Applicant must also apply for a Town building permit to ensure the proposed facility complies with Town building and design code. *Exhibit 14, Staff Report, pages 7 – 8.*

8. The proposed tower location is within Hunts Point Park (Park), adjacent to State Route (SR) 520 and the Hunts Point Road-SR 520 on-ramp. The Park surrounds the north side of SR 520 and the north and east sides of the on-ramp. A pedestrian trail and associated fencing and landscaping form the southern border of the Park located adjacent to SR 520 and the on-ramp. There is an entrance to the pedestrian trail from Hunts Point Road in the southwest corner of the Park. The trail extends east and southeast until it bends northeast. Then the trail continues approximately parallel to SR 520. *Exhibit 4.*

9. The Park contains tennis courts located north of the northeast bend in the pedestrian trail. The tennis courts are surrounded by a chain-link fence. The west and south edges of the courts are approximately parallel to the pedestrian trail. The proposed wireless facility would be located approximately 20 feet southwest of the tennis courts, between the courts and the pedestrian trail. The trail would be located approximately 20 feet southwest of the proposed wireless facility. The proposed equipment shelter would be located approximately two feet northwest of the proposed tower and approximately 20 feet southwest of the tennis courts, between the courts and the pedestrian trail. There are mature trees between the pedestrian trail and the proposed wireless facility; and also between the proposed equipment shelter and the pedestrian trail. *Exhibit 3; Exhibit 4.*

10. The Park is bordered to the south by SR 520, to the west by Town Hall property, to the north by Hunts Point Lane, and to the east by residential properties. HPMC 18.43.006(1)(b) requires a minimum 150 foot wide setback between a wireless service facility and the nearest private residence. According to the Town Staff Report, the proposed wireless service facility is more than 150 feet from the nearest residential property line. *Exhibit 4; Exhibit 14, Staff Report, pages 1 and 6.*

11. Hunts Point Town Hall is located approximately 80 feet north of the pedestrian trail at a point approximately 150 feet from the trail's entrance off Hunts Point Road. A parking lot is located east of the Town Hall. The parking lot is located approximately 10 feet north of the pedestrian trail at the lot's closest point to the trail. Trees provide a buffer between the Park and the parking lot. Hunts Point Lane is located along the Park parcel's northern border. Playground equipment is located south of Hunts Point Lane between the road and the tennis courts. The Park contains open space in addition to the set of tennis courts and playground equipment. *Exhibit 3; Exhibit 4.*

12. As shown in photo simulations submitted with the SUP application, the tower associated with the proposed facility would be visible, extending higher than existing trees, when looking south from the playground and when walking on the pedestrian trail. The existing tower is also visible from these locations. Existing trees include mature deciduous and evergreen trees. Existing vegetation would screen the lower portion of the proposed facility; proposed site plans state landscaping would screen three sides – northwest, southwest, and southeast - of the proposed equipment shelter. The Town Staff Report states that the proposed tower would be painted with a matte finish in a color subject to Town Council approval and designed to blend into surrounding vegetation. The Applicant's SEPA checklist states that the proposed tower would appear similar in color to the existing tower, a dark brown hue. The proposed equipment shelter would also be painted with neutral earth-tone colors similar to the existing equipment shelter on the subject property. *Exhibit 3; Exhibit 4; Exhibit 11; Exhibit 14, Staff Report, page 6.*

13. Mona Green, Town Planner, testified that the existing pedestrian path adjacent to the proposed wireless facility and equipment shelter is located within Washington State Department of Transportation (WSDOT) right of way (ROW), so the proposed facility

and equipment shelter is directly adjacent to WSDOT ROW. Ms. Green testified that changes will be made to the Hunts Point access from SR 520 in 2011. The Town Staff Report states that the existing SR 520 off-ramp would be relocated from the east to the west side of 84th Avenue NE, allowing the existing off-ramp to be part of a new landscaped highway lid. As depicted on an Urban Design Criteria diagram for SR 520, the existing pedestrian path would lie on the north boundary of a proposed green space that would be constructed to extend south over the full width of SR 520. The proposed wireless facility and existing equipment shelter would be located directly across the existing path from the proposed lid area. As stated on the Urban Design Criteria diagram, vegetation would be planted to create a visual buffer between SR 520 at lid edges and maintain an inward-looking sensibility. The lid would be comprised of a central green open space with trails and a seating area and landscaped buffers at edges. The Town Staff Report states that once highway improvements are complete, the proposed wireless facility would be located in the middle of the landscaped area of the lid. *Exhibit 14, Staff Report, page 2; Exhibit 15; Testimony of Ms. Green.*

14. Heather Smith, Town resident, testified that the Town's website refers to nature and sylvan beauty, that nature is a main element of the Town, and that the proposed "lid" over SR 520 would approximately double the size of green space in the Town.[5] *Testimony of Ms. Smith.*

15. Ms. Smith testified that the proposed wireless facility, including the tower, would impact those living north and south of SR 520 as well as Park users. Ms. Smith testified that there are otherwise no utility poles located in Hunts Point, only lamp posts; that the existing tower is the only pole; and that the existing tower is noticeable upon entry to the Town, creating a significant aesthetic impact. Dave Bocek testified to oppose the proposed use, citing his concern that the proposed tower is too high and large in diameter and that the proposed equipment shelter is too large in size for the Park. Mr. Bocek also testified that generators necessary to operate the proposed use would be noisy, and the proposed use would require an access road where none has been proposed. *Testimony of Ms. Smith; Testimony of Mr. Bocek.*

16. Mr. Cagan responded for the Applicant that park land is the highest priority area for locating wireless facilities within the Town under HPMC location criteria. HPMC 18.43.005 establishes an order of priority for locating new wireless facilities within the Town, and provides that the first priority shall be to locate new wireless facilities on public property. According to Town code, second priority shall be placing antennas on appropriate rights-of-way and existing structures such as public buildings. Third priority shall be locating new wireless facilities on private property, and shall only occur under certain conditions. *HPMC 18.43.005(1); HPMC 18.43.005(2).*

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[5] The Town website states "Residents relish the sylvan nature of Hunts Point and the privacy that comes with living in an urban forest. " *See* http://www.huntspoint-wa.gov/ , last accessed May 28, 2010.

17. Mr. Cagan also responded for the Applicant that he attended three or four Town Council meetings to discuss the proposed use before submitting a SUP application. Mr. Cagan testified that the Applicant has not fully considered an access to the proposed facility for re-fueling, and that the Bellevue Fire Department had not yet approved the site design.[6] Mr. Cagan also testified the Applicant considered alternate locations for the proposed wireless facility, but that WSDOT does not allow any encumbrances on ROW during proposed lid and related construction – a period of six years – and the Applicant did not find any other suitable sites for the proposed facility. Ms. Smith testified to inquire whether the Applicant considered a Yarrow Point or Town location within the existing Wetherill Nature Preserve, or Fairweather Park in Medina. Mr. Cagan responded that the Applicant had not considered a location in the nature preserve and that the location in Fairweather Park would be in WSDOT ROW and thus not permitted. No letters or other documents were submitted from WSDOT to corroborate the testimony of Mr. Cagan. *Testimony of Mr. Cagan; Testimony of Ms. Smith.*

18. The project narrative submitted with the SUP application states that no other suitable structures or towers to host the Applicant's antennas and equipment exists within a one-quarter mile radius of the proposed site, either within or outside the Town. The project narrative states that ROW adjacent to SR 520 in the Town of Clyde Hill was also evaluated, but the Applicant found the ROW lacked space for necessary equipment. *Exhibit 1.*

19. The Applicant's SEPA environmental checklist states that diesel generators would operate within the proposed equipment shelter in the event that electrical power to the proposed wireless facility is interrupted. The SEPA checklist also states that noise would be generated during the approximately two days needed to construct the proposed facility, and the proposed facility's electrical cabinet cooling fans inside the proposed equipment shelter would also generate some noise during facility operation. According to the SEPA checklist, soundproofing panels would reduce noise impacts to the south and west to meet local code noise standards. *Exhibit 11.*

20. HPMC 18.43.008(7) does not permit signals, lights, or signs on antennas or facilities unless required by the Federal Communications Commission (FCC) or Federal Aviation Administration (FAA). The Town Staff Report states the Applicant has not proposed any signals, lights, or signs. *HPMC 18.43.008(7); Exhibit 14, Staff Report, pages 6 – 7.*

21. Ms. Green testified to her opinion as a professional planner for the Town that the proposed wireless facility may not allow for co-location. She noted that the request to replace the existing tower with a tower providing co-location opportunities for additional carriers may not actually allow for additional carriers, because the three existing applicants (Clearwire, T-Mobile and Verizon) would use the tower to a height well below

[6] Exhibit 2 includes documents stating the Bellevue Fire Department reviewed and approved proposed project site plans on March 17, 2010 for generator location only. The documents states that the Fire Department requires full details on the fuel tank to approve location of the generator and fuel tank. *Exhibit 2.*

that of the existing tower. Thus, the tower may not be of sufficient height to accommodate a fourth carrier. She also noted that the proposed facility may not require an equipment shelter as large as proposed, given that the proposed tower could likely be shorter than proposed since it would not accommodate an fourth carrier anyway and could be designed for the three applicants alone. *Testimony of Ms. Green, cf. Exhibit 4, Sheet A-3.0.*

22. Derrick Priebe responded for the Applicant that batteries and radio switching equipment necessary to operate the proposed use would be approximately 15 feet long and space for air circulation is needed around batteries and equipment. Mr. Priebe acknowledged space for a future tenant could be added to the proposed equipment shelter later if another wireless carrier tenant were secured. Mr. Priebe added that more space is needed for Verizon because Verizon operates on three separate frequencies. Mr. Priebe also testified that the existing 77-foot tall tower is problematic for all carriers – Verizon, T-Mobile, and Clearwire - because the Clearwire signal is only able to operate from a space between 67- and 77-feet high on the tower. *Testimony of Mr. Priebe.*

23. According to the Applicant's *SEA Hunts Point RF Justification* by Verizon Wireless Network Engineering (Verizon RF Justification), wireless signal coverage for SR 520, Evergreen Point, Hunts Point, and Yarrow Point is currently being provided by Verizon's existing SEA Fairweather site, which must be removed as a result of the SR 520 expansion project. The Verizon RF Justification states the proposed use on the subject property is a replacement site to provide wireless signal coverage to approximately the same stretch of SR 520, the Town, Evergreen Point, and Yarrow Point, and concludes that terrain topography and tree heights in the vicinity of the subject property require that a wireless signal be broadcast from the subject property at a height of at least 70 feet to be viable. According to the Verizon RF Justification, antenna heights lower than 70 feet would cause the wireless signal to be blocked and attenuated. *Exhibit 16.*

24. The Town Staff Report states that the existing tower was constructed with an assurance from the Applicant Clearwire that the tower would allow for co-location of other service providers. No other provider has co-located on the existing tower. In addition, a letter from the current Applicant to the Town dated February 10, 2010 states:

> The current pole is constrained by both height and width. As a result, the existing pole is not technically feasible for co-location by the proposed applicants. As the number of embedded antennas is proposed to increase with the requirement of four wireless service providers, so too does the importance and limitation of the pole diameter. This is partly due to an increase in the number of coaxial cables required for signal transmission and the size of the actual wireless antennas.

The letter also states that the Applicant proposes co-location of a fourth service provider in the future, although the SUP application "only speaks in regard to the current capacities of our existing coverage in the area and we are not able to discern what another

carrier may need for future proposed coverage." The letter concludes that "without modification of the existing facility to include other carriers, regular wireless voice, data, and emergency service to the area would be severely and adversely affected," and the proposed design is the minimal width and height possible with existing technology to enable co-location of four service providers and to provide adequate wireless coverage from those carriers. *Exhibit 1; Exhibit 2; Exhibit 14, Staff Report, page 5.*

25. The Town Staff Report concludes that the existing tower constructed for Clearwire was not designed to accommodate additional providers for co-location, given the proposal to construct a taller replacement tower and that space for a fourth service provider should be eliminated from the proposed tower, reducing tower height by approximately 10 feet and tower width appropriately. The Staff Report also concludes that the Applicant has not provided information that the size of the proposed equipment shelter is the minimum necessary to operate proposed facilities. *Exhibit 14, Staff Report, pages 5 and 7.*

26. Clearwire US, LLC stated in a November 25, 2009 agreement that it would negotiate in good faith with the Town to establish co-location of additional wireless service facilities by other providers on the Clearwire facility proposed for the subject property, and construction of the antenna and an antenna support structure would accommodate co-location of additional facilities or antennas for future users. *Exhibit 5.*

27. HPMC 18.43.007(2) requires the Applicant to submit a landscape plan for the proposed facility; however, HPMC 18.43.009(1) provides that the Town may permit any combination of existing vegetation, topography, or other features instead of landscaping if they achieve the same degree of screening as the required landscaping. *HPMC 18.43.007(2); HPMC 18.43.009(1).* The Town Staff Report states that the Applicant has not yet submitted detailed landscape plans, and that actual landscape materials should be chosen in conjunction with proposed SR 520 improvements and proposed landscaped SR 520 lid with final design approval by the Town Council. *Exhibit 14, Staff Report, page 10.*

28. Existing and proposed wireless signal coverage maps submitted by T-Mobile and Verizon show that the proposed use would provide greater indoor/in building coverage in the Town and vicinity, replacing areas of only in-vehicle coverage in the Town and vicinity. Existing and proposed wireless signal coverage maps submitted by Clearwire show that a signal projected from the existing tower at 75 feet above ground level would provide in-building coverage to a smaller area in the Town and in the vicinity than a signal projected from the proposed tower at 95 feet above ground level, replacing areas of only in-vehicle coverage. *Exhibit 6.*

29. The Applicant's project narrative states that the proposed use would not interfere with the reception or transmission of other legally licensed commercial or private facilities, including emergency services. According to a FCC Radio Station Authorization submitted by the Applicant, the Applicant is currently licensed by the FCC to provide

wireless broadband services. The license for T-Mobile expires April 28, 2017, and the license for Verizon expires October 1, 2014. *Exhibit 1; Exhibit 8.*

30. The 1996 Federal Telecommunications Act expressly prohibits local officials from any claims that radiofrequency (RF) emissions may cause health problems, when proposed wireless communication facilities comply with FCC RF exposure limits. *47 U.S.C. s. 332(c)(7)(B)(iv).* The Applicant submitted an affidavit of qualification and certification by a radio engineer and licensed professional engineer that ground-level RF exposure for the proposed wireless facility would comply with current FCC and local rules regarding public exposure to RF electromagnetic fields. *Exhibit 9.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has authority to review requests for special use permits, and may approve, conditionally approve or deny the requested special use permit. *HPMC 18.43.013(1).* The Hearing Examiner's decision to approve, conditionally approve or deny a special use permit shall be in writing, and such findings of fact and conclusions shall be supported by substantial evidence in the administrative record.[7] Any conditions imposed must be based on the purposes and policy statement of HPMC Ch. 18.43, as set forth in HPMC 18.43.001 and 18.43.002. *HPMC 18.43.013(5).*

Criteria for Review

Under HPMC 18.43.013(4), special use permits (SUP) are required for wireless facilities and antenna facilities proposed to be more than 26 feet in height. Every application for a SUP shall be reviewed by the Hearing Examiner for compliance with the development standards in Ch. 18.43 HPMC. The Hearing Examiner may approve or conditionally approve an application for a SUP meeting all of the development standards in Ch. 18.43 HPMC, as long as the applicant also demonstrates compliance with the following:

1. There will be no injury to the neighborhood or other detriment to the public welfare;

2. There is a need for the proposed facility or antenna to be located in or adjacent to the residential area, which shall include documentation of the procedures involved in the site selection and an evaluation of the alternative sites and existing facilities on which the proposed facility or antenna could be located or co-located;

3. The facility or antenna shall be designed to be as least intrusive as practicable, including, but not limited to, the exterior treatment of the facility so as to be harmonious with the character of the surrounding neighborhood, the use of landscaping and privacy screening to buffer the facility and activities on the site from surrounding properties and that any equipment that is not enclosed shall be designed and located on the site to minimize impacts related to noise, light and glare onto surrounding properties; and

[7] "Substantial evidence" is not defined by the Hunts Point Municipal Code (HPMC). "Substantial evidence" has been defined by the Washington Supreme Court as "evidence sufficient to persuade a fair-minded person of the order's truth or correctness." *Benchmark Land Co. v. City of Battle Ground,* 146 Wn.2d 685 (2002).

4. In those situations where strict application of the standards in this chapter would result in the applicant's inability to provide telecommunications services or if the applicant claims that the application of this chapter would unreasonably discriminate among providers of functionally equivalent services, the applicant shall provide a written statement which provides detailed information supporting this claim(s).

HPMC 18.43.013(4).

The Ch. 18.43, HPMC development standards are the following:

1. Design Criteria:
   a. Co-location. New facilities shall be designed to accommodate co-location, unless the applicant demonstrates why such design is not feasible for economic, technical or physical reasons;
   b. Architectural Compatibility. Facilities shall be architecturally compatible with the surrounding buildings and land uses in the town, and screened or otherwise integrated, through location and design, to blend in with the existing characteristics of the site;
   c. All facilities shall comply with the minimum setback requirements of the area in which they are located. A special use permit shall be required to vary from the minimum setback requirements, and may only be granted if there are unusual geographical limitations or other public policy considerations as determined in the sole discretion of the town. Such considerations shall include by way of illustration, and not limitation, the following: (a) Impact on adjacent properties; (b) Alternative sites for personal wireless service facilities; (c) The extent to which screening and camouflaging will mitigate the effects of the wireless facilities[8];
   d. View Corridors. Due consideration shall be given so that placement of towers, antennas and personal wireless service facilities do not obstruct or significantly diminish currently existing views of Lake Washington and surroundings;
   e. Color. Antennas and facilities shall have a color generally matching the surroundings or background, in such a way that visibility is minimized, unless a different color is required by the FCC or FAA;
   f. Lights, Signals and Signs. No signals, lights or signs shall be permitted on antennas or facilities unless required by the FCC or FAA. Should lighting be required, in cases where there are residents located within a distance which is 300 percent of the height of the antenna, then dual mode lighting shall be requested from the FAA;
   g. Equipment Structures. Ground level equipment, buildings, and the tower base shall be screened from public view. The standards for equipment buildings are as follows: (a) The maximum floor area is 200 square feet and the maximum height is seven feet. Except in unusual circumstances or for other public policy considerations, the equipment building may be located no more than 150 feet from the antenna or facility. Depending upon the aesthetics and other issues, the town, in its sole discretion, may approve multiple equipment structures, one or more larger structures and/or multiple structures for multiple applicants; (b) Ground level buildings shall be screened from view by landscape plantings, fencing, or other appropriate means, as specified herein or in other town ordinances or codes; (c) Equipment buildings shall comply with setback requirements and shall be designed so as to conform in appearance with nearby residential structures;

[8] Right-of-Way Setback Exception. The setback requirement may be waived pursuant to a special use permit if the antenna and antenna support structure are located in town right-of-way. *HPMC 18.43.008(4).*

h. Federal Requirements. All antennas and antenna support structures must meet or exceed current standards and regulations of the FAA, the FCC and any other agency of the federal government with the authority to regulate antennas and antenna support structures;
i. Building Codes, Safety Standards. To ensure the structural integrity of towers, antennas, antenna support structures and facilities, the applicant/owner shall ensure that they are maintained in compliance with standards contained in the applicable town building codes and the applicable standards for antenna support structures published by the EIA, as amended from time to time;
j. Structural Design. Antenna support structures shall be constructed to EIA standards, which may be amended from time to time, and to all applicable codes adopted by the town;
k. Fencing. A well-constructed wall or wooden fence not less than six feet in height from the finished grade shall be provided around each wireless service facility. Access to the facility shall be through a locked gate. The use of chain link, plastic, vinyl, or wire fencing is prohibited unless it is fully screened from public view by a minimum eight-foot wide landscaping strip. All landscaping shall meet applicable town code requirements;
l. Antenna and Antenna Support Structure Height. The applicant shall demonstrate that the antenna and antenna support structure proposed in its application is the minimum height required to function satisfactorily. No antenna or antenna support structure that is taller than this minimum height shall be approved;
m. Antenna Support Structure Safety. The applicant shall demonstrate that the proposed antenna and support structure are safe and the surrounding areas will not be negatively impacted by support structure failure, falling ice, or other debris or interference. All support structures shall be fitted with anti-climbing devices, as approved by the manufacturers;
n. Antenna Criteria. Antennas on or above a structure shall be subject to the following: (a) The antenna shall be architecturally compatible with the building and wall on which it is mounted, and shall be designed and located so as to minimize any adverse aesthetic impact; (b) Where the antenna is mounted or placed on utility poles or lighting standards, the antenna shall be designed and located so as to minimize any adverse aesthetic impact; (c) The antenna shall be mounted on a wall of an existing building on a configuration as flush to the wall as technically possible and shall not project above the wall on which it is mounted unless it must be for technical reasons. In no event shall an antenna project more than 16 feet above the roof line, including parapets; (d) The antenna shall be constructed, painted, or fully screened to match as closely as possible the color and texture of the building, wall or structure upon which it is mounted; (e) If an accessory equipment shelter is present, it must blend with the surrounding buildings in architectural character and color; (f) The structure must be architecturally and visually (color, size, bulk) compatible with surrounding existing buildings, structures, vegetation and uses; (g) Site location and development shall preserve the pre-existing character of the site as much as possible. Existing vegetation should be preserved or improved, and disturbance of the existing topography of the site should be minimized, unless such disturbance would result in less visual impact of the site on the surrounding area. The effectiveness of the visual mitigation techniques must be evaluated by the town, in the town's sole discretion;
o. Interference. No antenna shall cause localized interference with the reception of any other communications signals, including, but not limited to, public safety, television, and radio broadcast signals; and
p. Guy Wires Restricted. No guy or support wires shall be used in connection with such antenna, antenna array, or its support structure except when used to anchor the antenna, antenna array or support structure to an existing building to which such antenna, antenna array, or support structure is attached.

2. Landscaping Requirements:

a. Landscaping, as described herein, shall be required to screen wireless service facilities as much as possible, to soften the appearance of the cell site. The town may permit any combination of existing vegetation, topography, walls, decorative fences or other features instead of landscaping, if they achieve the same degree of screening as the required landscaping; and
b. Screening. The visual impacts of a personal wireless service facility shall be mitigated through landscaping or other screening materials at the base of the tower and ancillary structures. The following landscaping and buffering shall be required around the perimeter of the antenna and antenna support structure, except that the town may waive the standards for those sides of the facility that are not in public view. Landscaping shall be installed on the outside of fences. Existing vegetation shall be preserved to the maximum extent practicable and may be used as a substitute for or as a supplement to landscaping requirements.

Federal Telecommunications Act of 1996

In addition to considering the criteria and guidance in the Hunts Point Municipal Code, the Hearing Examiner must be cognizant of federal statues and case law decisions that impact what authority a local government has over the location of wireless communication facilities.

Federal law places certain limitations upon the power of local government to control the location of personal wireless service facilities ("wireless facilities"). *47 U.S.C. 332(c)(7)(A).*[9] Chief amongst those limitations is the preemption of control over radio frequency emissions. *47 U.S.C. 332(c)(7)(B)(iv).* As long as the wireless facility emits radio energy within the Federal Communications Commission's guidelines, local jurisdictions are forbidden from considering such emissions in decisions about placement, construction, or modification of wireless facilities.

Other restrictions include a ban on any regulations that prohibit or have the effect of prohibiting the provision of personal wireless services. *47 U.S.C. 332(c)(7)(B)(i)(II).* When applying a zoning code to a specific wireless facility site proposal, the local authority retains most of its original discretion. Both the visual impact of a wireless facility and its departure from the area's general character can be legitimate reasons for denial of a siting permit. *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 727 (9th Cir. 2005). The standard for evaluating the denial of a particular antenna site adopted is the "least intrusive" standard. *MetroPCS*, 400 F.3d at 735. Under the "least intrusive" standard, the applicant bears the burden of showing that a

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[9] (7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

47 U.S.C. Sec. 332(c)(7).

particular site is the least intrusive site. *See APT Pittsburgh Ltd. Partnership v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469, 479-80 (3rd Cir. 1999). If the proposed site is the least intrusive and the denial of that location would effectively prevent the applicant from providing its service in the area, then the permit must be issued. *Cingular Wireless, Inc. v. Thurston County*, 425 F.Supp.2d 1193, 1195-6 (W.D. Wash. 2006). *47 U.S.C. sec. 332(c)(7)(B)(iv).*

Conclusions Based on Findings

The administrative record does not contain sufficient evidence to support a conclusion that the proposed wireless service facility would comply with Ch. 18.43 HPMC design and landscaping criteria, or that the proposed wireless facility is designed to be the least intrusive as practicable. The Washington Supreme Court defines "substantial evidence" as "evidence sufficient to persuade a fair-minded person of the order's truth or correctness." *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685 (2002). Upon examination of the administrative record for the special use permit (SUP) application, the Hearing Examiner finds insufficient evidence in the record to be able to conclude that the proposed wireless communications facility is designed to be the least intrusive as practicable to satisfy the wireless communication objectives of the proposed use, or that the proposed facility would comply with HPMC 18.43 design criteria.

As proposed by the Applicant, the building that would be constructed to house equipment to operate the proposed wireless facility would not meet the structure floor area limitation. Ch. 18.43 HPMC limits equipment structure floor area to 200 square feet. As proposed, the equipment shelter associated with the proposed wireless communications facility would be 726 square feet, almost four times the floor area limit. The Applicant has not applied for a variance from this limitation and the ordinance does not expressly authorize discretion by the Hearing Examiner to allow case-by-case deviations from Ch. 18.43 HPMC design standards. Deviation from those standards should be granted only if consistent with the criteria for approval of a variance.

In addition, there is not sufficient evidence in the record to support a conclusion that the proposed wireless facility would be designed to accommodate co-location as required by Ch. 18.43 HPMC design standards. The evidence in the record shows that a fourth wireless carrier to occupy space within the proposed cellular tower has not been identified; that the current SUP request results from a technological change since 2007 in the number of coaxial cables and wireless antennas necessary for signal transmission; and that one cannot know at this time what another carrier may need for future proposed coverage. Thus, it is not possible to determine whether the proposed facility would have space sufficient to accommodate co-location of a fourth service provider when that service provider is to be identified at some unspecified time in the future. If the proposed tower height and size of the equipment shed is partly for the purpose of accommodating a fourth carrier, there is no evidence to support a claim that the needs of a fourth carrier could be accommodated by the proposed tower. It is possible that the tower height could be reduced and still provide coverage for the three carriers presently identified. It appears the Applicant could reduce the proposed tower height and still meet the coverage needs of the three carriers.

Moreover, there is not sufficient evidence to convince a fair-minded decision maker that the proposed equipment shelter is designed to be the least intrusive as practicable. Exhibits and testimony in the record state that 175 square feet within the proposed equipment shelter would be set aside for a future tenant who has yet to be identified, but there is no evidence in the record explaining why 175 square feet cannot be eliminated from equipment shelter design at the present time. If a future tenant is identified, space could either be shared with existing tenants or tailored more specifically to the needs of the individual tenant at the time of expansion. Testimony in the record states batteries and radio switching equipment are approximately 15 feet long with a need for additional space around equipment for air circulation, but exhibits and testimony in the record do not provide sufficient information to provide a logical link for the fair-minded decision maker between the amount and size of equipment necessary for operation of each service provider and the space set aside for each service provider within the proposed equipment shelter.

Finally, there is not sufficient information in the record to support the claim that wireless communication facilities cannot be located within the WSDOT ROW during construction or following construction. Although testimony was offered stating this to be the case, the individual testifying could not be specific about the scope or duration of the restriction nor could he reference an RCW, WAC, construction document or letter that referenced this restriction. Because this information is critical to a determination of the suitability of alternative locations, it is essential there be sufficient support in the record to support testimony on this topic.

Because there is not sufficient information in the record to convince a fair-minded decision maker that the proposed cellular tower would actually allow for co-location by an additional carrier; that the tower and equipment shelter are as least intrusive as possible; and that WSDOT will not allow location within a right-of-way, the application cannot be approved at this time. Because the Hunts Point Municipal Code (HPMC) requires that the conclusions of the Hearing Examiner be supported by substantial evidence in the administrative record, the special use permit (SUP) application must be denied without prejudice. *Findings 1, 4 – 30.* If additional evidence becomes available to the Applicant that may add support to his application, the hearing may be re-opened following public notice to consider that additional information at an open record hearing.

DECISION

Based on the preceding Findings and Conclusions, the application for a Special Use Permit to replace an existing 77-foot tall Clearwire cellular tower with a new wireless communication facility, including a 97-foot tall cellular tower, at 3000 Hunts Point Road, in Hunts Point,

Washington is **DENIED**, without prejudice.

Decided this 1st day of June 2010.

THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center

TOWN OF HUNTS POINT

HEARING EXAMINER PUBLIC HEARING
SIGN IN SHEET
For
Verizon Wireless, T-Mobile, & Clearwire US
Special Use Permit Application
DATE: May 18, 2010

Name	Company/Address, Zip Code
Derrick Priebe	T-Mobile (TelcoPacific) 19807 Northcreek Pkwy N, Bothell, WA 98011
Chris Martin	T-Mobile (Nexius) 19807 North Creek Pkwy, Bothell, WA 98011
Matt Cagan	Verizon Wireless / CBM 8760 122nd Ave NE Kirkland 98033
[redacted]	[redacted]

Town of
Serving Our Residents
Hunts Point

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March 20, 2012

3/20/12 emailed to Gibran Hashmi
Copy to Mona Green
emailed to George Johnston

Gibran Hashmi
Cascadia PM
8760 122nd Avenue NE
Kirkland, WA 98033

RE: Findings, Conclusions & Decision Following Re-Opened Hearing & Clarification on Special Use Permit 09-01

Dear Gibran,

Enclosed are the Findings, Conclusions and Decision on the Special Use Permit No. 09-01 before the Hearing Examiner on March 15, 2012. The request for a Clarification on the Special Use Permit to replace an existing 77-foot tall Clearwire cellular tower with a new wireless communication facility, including a 97-foo tall cellular tower, at 3000 Hunts Point Road, in Hunts Point, Washington is APPROVED, with conditions.

If you have any questions, please do not hesitate to call me.

Sincerely.

Sue Israel
Deputy Town Clerk, Treasurer

Encl.

Cc: Mona Green, Town Planner
George Johnston, T-Mobile

Hi Sue,

If you need to send something to Mr. Hashmi, he likely only needs the last page. That page has the amended condition and my signature. However, in order to support the changed condition I needed to do some additional findings and procedures. That's why I'm re-issuing the full decision with modifications as noted.

TH

BEFORE THE HEARING EXAMINER
FOR THE TOWN OF HUNTS POINT

In the Matter of the Application of	) No. 09-01
	)
Verizon Wireless, T-Mobile, and Clearwire US, LLC	) **Cell Tower and Wireless Communication Facility**
	)
	) FINDINGS, CONCLUSIONS, AND
	) DECISION FOLLOWING
For a Special Use Permit	) RE-OPENED HEARING & CLARIFICATION

The Hearing Examiner received a request dated February 23, 2012 from Cascadia PM on behalf of Verizon Wireless, T-Mobile, and Clearwire US, LLC for clarification of Condition No. 2 of the following decision, in accord with Hunts Point Hearing Examiner Rules of Procedure Section 1.9.5. The Hearing Examiner conducted a public hearing on the request on March 15, 2012. The Town provided notice of the request and associated hearing in accord with Town ordinances.

Modifications to the original decision are identified below in **bold underline**. *Additional findings resulting from the March 15, 2012 hearing have been noted in* **bold underline** *and Condition No. 2 is modified in* **bold underline**. *Modifications to the initial decision made following a re-opened hearing held June 15, 2010, are identified in* ***bold.*** *The only new material in this issuance of the decision is the material identified by bold underline. In accord with Rules of Procedure Section 1.9.5, the effect of the Hearing Examiner's decision is not stayed and the conclusions of the decision are not amended.*

SUMMARY OF DECISION

The request for a Special Use Permit to replace an existing 77-foot tall Clearwire cellular tower with a new wireless communication facility, including a 97-foot tall cellular tower, at 3000 Hunts Point Road, in Hunts Point, Washington is **APPROVED**, with conditions.

PROCEDURAL BACKRGROUND

On May 18, 2010, the Town of Hunts Point Hearing Examiner held an open record hearing on the Special Use Permit request. Based on findings and conclusions drawn from exhibits and testimony in the record at the time of the hearing, the Hearing Examiner denied the request without prejudice on June 1, 2010. The Hearing Examiner noted that the Applicants could request the hearing be re-opened following public notice if additional information became available to the Applicants that would support the request.

The Applicants Verizon Wireless and T-Mobile filed separate requests for reconsideration and to re-open the record on the request under Hunts Point Municipal Code 2.35.110 on June 15, 2010. On June 22, 2010, the Hearing Examiner granted the request and scheduled the re-opened hearing for July 20, 2010. At the July 20 hearing, the Town of Hunts Point requested additional time to review and evaluate technical documents submitted by the Applicants and admitted into the record at the hearing. Following review and evaluation, the Town requested the Hearing Examiner proceed with the re-opened hearing. The Town submitted additional information for the record on August 20, 2010. Upon motion of the parties, the Hearing Examiner continued the re-opened hearing until September 2, 2010.

SUMMARY OF RECORD

Request:
Matt Cagan, Cascadia PM, for Verizon Wireless; Derrick Priebe, Telco Pacific, for T-Mobile; and Edward Hill for Clearwire US, LLC request a Special Use Permit to replace an existing 77-foot tall Clearwire cellular tower with a new wireless communication facility, including a 97-foot tall cellular tower. The wireless facility would be located adjacent to the Town of Hunts Point tennis courts, at 3000 Hunts Point Road, in Hunts Point, Washington.

Hearing Date:
The Town of Hunts Point Hearing Examiner held an open record hearing on the initial request on May 18, 2010. The Hearing Examiner granted Applicants' Verizon Wireless and T-Mobile motion for reconsideration and to re-open the hearing. The re-opened hearing was scheduled for July 20, 2010. Upon motion of the parties, the Hearing Examiner continued the re-opened hearing until September 2, 2010. The Hearing Examiner closed the record at the conclusion of the September 2, 2010 re-opened hearing.

Testimony:
The following individuals presented testimony under oath at the open record hearing:

May 18, 2010 Open Record Hearing
Mona Green, Town Planner
Matt Cagan, Cascadia PM, for Verizon Wireless
Derrick Priebe, Telco Pacific, for T-Mobile
Heather Smith
Dave Bocek

July 20, 2010 Re-Opened Hearing
Mona Green, Town Planner
Matt Cagan, Cascadia PM, for Verizon Wireless
Derrick Priebe, Telco Pacific, for T-Mobile
Chris Martin, Radio Frequency Engineer, for T-Mobile
Heather Smith

September 2, 2010 Re-Opened Hearing (continued)

Chris Martin, Radio Frequency Engineer, for T-Mobile

March 15, 2012 Open Record Hearing on Clarification Request
Gibran Hashmi, Cascadia PM, Applicant Representative
Mona Green, Town Planner
George Johnston, T-Mobile Representative

Charles E. Maduell, Attorney at Law, represented the Applicant Verizon Wireless at the July 20, 2010 and September 2, 2010 re-opened hearing.

Molly A. Lawrence, Attorney at Law, represented the Applicant T-Mobile at the July 20, 2010 and September 2, 2010 re-opened hearing.

Margaret King, Attorney at Law, represented the Town of Hunts Point at the July 20, 2010 and September 2, 2010 re-opened hearing.

Exhibits:
The following exhibits were admitted into the record:

1. Application and Project Narrative, received December 3, 2009
2. Project Correspondence: Email message from Mona Green to Matt Cagan and Derrick Priebe, sent December 24, 2009; Applicant Response, dated February 10, 2010; Email message from Mona Green to Matt Cagan and Derrick Priebe, sent February 17, 2010; Applicant Response, dated February 22, 2010; Bellevue Fire Department Proposal Approval, dated March 17, 2010
3. Photo simulations of existing conditions and conditions with proposed project, undated
4. Plan Set, with Title Page dated February 2, 2010
5. Agreement to Comply with HPMC 18.43.007(2)(c)(i) & (ii), (k), and (l), Clearwire US, LLC, dated November 25, 2009; Co-Location Agreement, Clearwire US, LLC, dated June 7, 2006
6. T-Mobile USA SE08013A Hunts Point Relo/Clearwire Existing Coverage Map, Proposed Coverage Map; Verizon Wireless existing and proposed coverage Plot Map; Clearwire SEA552 Coverage 75' ACL and 95' ACL Maps
7. King County Assessor Real Property Records, Legal Description, obtained February 17, 2007
8. FCC Wireless Telecommunications Bureau Radio Station Authorization, Registration No. 0001565449, Expires April 28, 2017; FCC Cellular License, License No. 0001581305, Expires October 1, 2014
9. Non-Ionizing Electromagnetic Field Exposure Analysis and Engineering Certification for Verizon Wireless, dated November 2009; Non-Ionizing Electromagnetic Field Exposure Analysis and Engineering Certification for T-Mobile, dated November 23, 2009
10. FAA Structure Notice Requirements, obtained November 25, 2009
11. SEPA Checklist, dated February 10, 2010

12. SEPA Optional Determination of Nonsignificance (DNS) Notice Materials, dated April 13, 2010
13. Notice of Public Hearing, dated April 15, 2010
14. Town Staff Report, dated May 13, 2010
15. State Route 520 Urban Design Criteria, undated
16. SEA Hunts Point RF Justification, Verizon Wireless Network Engineering
17. Radio Frequency Engineer Site Analysis, T-Mobile Project No. SE08013A, dated May 17, 2010
18. SEPA Determination of Nonsignificance, dated May 20, 2010
19. Applicants' Supplemental Application Materials, July 20, 2010 Hearing, with the following:
    a. Revised Project Drawings, dated July 20, 2010
    b. Equipment Enclosure
        i. Letter from Matt Cagan, Cascadia PM regarding equipment enclosure, dated July 19, 2010
        ii. Verizon Wireless's Equipment Enclosure Plan with explanatory letter from Richard J. Moss, dated July 19, 2010
        iii. T-Mobile's Revised Equipment Enclosure Plan with explanatory letter from B.J. Thomas, dated July 19, 2010
    c. Replacement Monopole
        i. Structural Analysis/Letter from KV Lew P. Eng and Kurt W. Groesch, Adapt Engineering, Inc., dated July 19, 2010
        ii. Supplemental Radio Frequency Analysis from Chris Martin, T-Mobile, received July 20, 2010
        iii. Supplemental Radio Frequency Analysis from Ross Galang, Clearwire, regarding microwave dishes, dated July 16, 2010
        iv. March 13, 2007 Town of Hunts Point Hearing Examiner Findings, Conclusions, and Decision, Clearwire LLC Special Use Permit SUP-06-01
    d. WSDOT Alternative Locations
        i. Letter from Patrick Sullivan, WSDOT, dated June 14, 2010
20. Affidavit of Notice, dated July 20, 2010
21. Statement of Jonathan L. Kramer, dated August 20, 2010, with Exhibits 1 and 2
22. Declaration of Chris Martin, dated September 2, 2010, with Exhibits 1 and 2
23. SEA Hunts Point Replacement Site Supplemental Data and Analysis, dated September 1, 2010
24. Affidavit of Notice, dated September 2, 2010
25. Memorandum from Mona Green, Town Planner, dated March 9, 2012
26. Notice of Public Hearing Request to Amend Hearing Examiner's Conditions of Approval, undated
27. Letter from Gibran Hashmi, Site Acquisition Specialist, Cascadia PM, dated February 23, 2012
28. Copy of Hearing Examiner Findings, Conclusions, and Decision on Special Use Permit 09-01, dated September 16, 2010

29. Affidavit of Notice of Hearing to Amend Hearing Examiner's Conditions of Approval, dated March 1, 2012

Pleadings:
The Office of the Hearing Examiner received the following pleadings from the Applicants and the Town:

1. Verizon Wireless's Request for Reconsideration and to Re-Open the Hearing and Notice of Appearance, dated June 15, 2010
2. T-Mobile's Request for Reconsideration and Notice of Appearance, dated June 15, 2010
3. T-Mobile, Verizon Wireless and Clearwire Request for Continuance, dated July 15, 2010
4. Town of Hunts Point's Request to Re-Open the Hearing, dated August 3, 2010
5. Verizon Wireless and T-Mobile's Objection to Hunts Point's Request to Re-Open Hearing, dated August 5, 2010
6. Town of Hunts Point's Reply to Verizon Wireless and T-Mobile's Objection to Hunts Point's Request to Re-Open Hearing, dated August 6, 2010

The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing and re-opened hearing:[1]

FINDINGS

1. Matt Cagan, Cascadia PM, for Verizon Wireless; Derrick Priebe, Telco Pacific, for T-Mobile; and Edward Hill for Clearwire US, LLC request a Special Use Permit (SUP) to replace an existing 77-foot tall Clearwire cellular tower with a new wireless communication facility, including a 97-foot tall cellular tower. The wireless facility would be located adjacent to the Town of Hunts Point (Town) tennis courts, within the Town of Hunts Point Park, at 3000 Hunts Point Road, in Hunts Point, Washington.[2] *Exhibit 1; Exhibit 14, Staff Report, page 1.*

2. The Town received the SUP application on December 3, 2009 and determined the application was complete on April 6, 2010. *Exhibit 1; Exhibit 13.* The Town mailed and posted notice of the application and associated open record hearing as required by Town ordinances. The Town published notice of the application and hearing in the *Seattle Times* on April 15, 2010. *Exhibit 13.* **The Town mailed notice of the July 20, 2010 re-opened hearing to parties of record on June 22, 2010, and mailed notice of the continued hearing on August 17, 2010.** ***Exhibit 20; Exhibit 24.*** ***The Town mailed and***

[1] Findings and conclusions based upon testimony and exhibits admitted at the re-opened hearing are identified by **bold** within the finding or conclusion; findings and conclusions amended based on testimony and exhibits admitted at the re-opened hearing are identified by ~~strikethrough~~; and some material supporting the earlier denial of the applications has been completed deleted from this decision.

[2] The property subject to the request is identified by King County Assessor Tax Parcel No. 0540100726. A legal description of the subject property is found within the proposed wireless facility site plan maps. *Exhibit 4; Exhibit 7.*

posted notice of the open record hearing on the request for clarification of Special Use Permit 09-01, dated September 16, 2010, in accord with Town Ordinances. Exhibit 26; Exhibit 28; Exhibit 29.

3. The Town analyzed the environmental impact of the proposed SUP, as required by the State Environmental Policy Act (SEPA), Ch. 43.21C RCW. On April 13. 2010, the Town gave notice that it would likely issue a Determination of Nonsignficance (DNS) for the proposal according to Washington Administrative Code (WAC) Section 197-11-355 Optional DNS Process requirements.[3] At the open record hearing on the proposal, Town Planner Mona Green testified that the Town received no comments on the likely DNS, that the SEPA comment period ended on the date of the hearing on May 18, 2010, and that any comments about the likely determination made during the hearing would be made part of the SEPA record. The Town issued a final DNS determination on May 20, 2010. No SEPA appeals were filed as of the date of this Hearing Examiner decision.[4] *Exhibit 12; Exhibit 18; Testimony of Ms. Green.*

4. The Applicant proposed replacing an existing 77-foot tall, 18-inch diameter Clearwire cellular tower on the subject property adjacent to Town tennis courts[5] with a new 97-foot tall, 36-inch diameter wireless tower, which is depicted as a "stealth antenna mast" on proposed site plans. The existing Clearwire cellular tower and associated concrete footing would be removed immediately upon construction of the proposed tower. The Clearwire equipment box would remain in place. *Exhibit 1; Exhibit 4; Exhibit 14, Staff Report, page 1.*

5. The proposed wireless tower would provide antenna space serving four total service providers: Verizon Wireless; T-Mobile; Clearwire US, LLC; and a future tenant yet to be determined. The proposed tower would conceal four antennas, one for each service provider and one for a future tenant. The tower would not be supported by guy wires. *Exhibit 4; Exhibit 14, Staff Report, pages 1 and 10.*

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[3] According to WAC Section 197-11-355, if a GMA county or city with an integrated project review process (RCW 36.70B.060) is lead agency for a proposal and has a reasonable basis for determining significant adverse environmental impacts are unlikely, it may use a single integrated comment period to obtain comments on the notice of application and the likely threshold determination for the proposal. If the process is used, a second comment period will typically not be required when the DNS is issued. If a DNS is issued, the lead agency shall send a copy of the DNS to the department of ecology, agencies with jurisdiction, those who commented, and anyone requesting a copy. *WAC 197-11-355.*

[4] The appeal period is due to end June 3, at the time this decision is scheduled to be issued. If an appeal is filed prior to release of this decision, this application hearing shall be continued until an appeal of the DNS can be heard and decided.

[5] The Town Hearing Examiner approved a Special Use Permit (SUP) for the existing cellular tower by Hearing Examiner Decision No. SUP-06-01, issued March 13, 2007.

6. The Applicant would also construct a new equipment shelter adjacent to the northwest of the proposed antenna. The proposed equipment shelter would remain locked from the public at all times. **At the initial hearing,** Matt Cagan testified for the Applicant that proposed equipment shelter dimensions would be 66-feet-by-11-feet-by-10-feet, for a total area of 726 square feet. Mr. Cagan testified that the proposed shelter size differs from the standard equipment shelter size of 26-feet-by-11-feet-by-10-feet because the additional approximately 40 feet in length is necessary to provide space addressing the needs of T-Mobile and the future tenant. According to the Town Staff Report, Verizon would use approximately 250 square feet, T-Mobile would use approximately 190 square feet, a future tenant could use up to 175 square feet, and space has also been set aside for an electric generator within the proposed equipment shelter. Mr. Cagan added that the subject property currently contains an existing equipment shelter used to store Clearwire equipment that would be retained following construction of the proposed tower. The existing shelter is approximately 121 square feet in size and adjacent to the southeast of the proposed tower, as depicted on proposed site plans. **At the re-opened hearing, Mr. Cagan submitted Revised Project Drawings that depict a shelter reduced in size to 415 square feet (see Finding 33 for detail).** *Exhibit 4; Exhibit 14, Staff Report, pages 7 - 8; Testimony of Mr. Cagan.*

7. Hunts Point Municipal Code (HPMC) Section 18.43.007(1) provides that a wireless service facility less than 26 feet in height is permitted within the Town with a site development permit obtained under Ch. 15.45 HPMC. *HPMC 18.43.007(1).* A Special Use Permit (SUP) is required for wireless service facility installation when the proposed facility would exceed 26 feet in height. The Town Staff Report states that the proposed equipment shelter would exceed 200 square feet, the maximum equipment shelter floor area as established in HPMC 18.43.008(8)(a) and the proposed wireless facility would exceed 26 feet in height; thus a SUP is required. The Town Staff Report also states that the Applicant must also apply for a Town building permit to ensure the proposed facility complies with Town building and design code. *Exhibit 14, Staff Report, pages 7 – 8.*

8. The proposed tower location is within Hunts Point Park (Park), adjacent to State Route (SR) 520 and the Hunts Point Road-SR 520 on-ramp. The Park surrounds the north side of SR 520 and the north and east sides of the on-ramp. A pedestrian trail and associated fencing and landscaping form the southern border of the Park located adjacent to SR 520 and the on-ramp. There is an entrance to the pedestrian trail from Hunts Point Road in the southwest corner of the Park. The trail extends east and southeast until it bends northeast. Then the trail continues approximately parallel to SR 520. *Exhibit 4.*

9. The Park contains tennis courts located north of the northeast bend in the pedestrian trail. The tennis courts are surrounded by a chain-link fence. The west and south edges of the courts are approximately parallel to the pedestrian trail. The proposed wireless facility would be located approximately 20 feet southwest of the tennis courts, between the courts and the pedestrian trail. The trail would be located approximately 20 feet southwest of the proposed wireless facility. The proposed equipment shelter would be located

approximately two feet northwest of the proposed tower and approximately 20 feet southwest of the tennis courts, between the courts and the pedestrian trail. There are mature trees between the pedestrian trail and the proposed wireless facility; and also between the proposed equipment shelter and the pedestrian trail. *Exhibit 3; Exhibit 4.*

10. The Park is bordered to the south by SR 520, to the west by Town Hall property, to the north by Hunts Point Lane, and to the east by residential properties. HPMC 18.43.006(1)(b) requires a minimum 150 foot wide setback between a wireless service facility and the nearest private residence. According to the Town Staff Report, the proposed wireless service facility is more than 150 feet from the nearest residential property line. *Exhibit 4; Exhibit 14, Staff Report, pages 1 and 6.*

11. Hunts Point Town Hall is located approximately 80 feet north of the pedestrian trail at a point approximately 150 feet from the trail's entrance off Hunts Point Road. A parking lot is located east of the Town Hall. The parking lot is located approximately 10 feet north of the pedestrian trail at the lot's closest point to the trail. Trees provide a buffer between the Park and the parking lot. Hunts Point Lane is located along the Park parcel's northern border. Playground equipment is located south of Hunts Point Lane between the road and the tennis courts. The Park contains open space in addition to the set of tennis courts and playground equipment. *Exhibit 3; Exhibit 4.*

12. As shown in photo simulations submitted with the SUP application, the tower associated with the proposed facility would be visible, extending higher than existing trees, when looking south from the playground and when walking on the pedestrian trail. The existing tower is also visible from these locations. Existing trees include mature deciduous and evergreen trees. Existing vegetation would screen the lower portion of the proposed facility; proposed site plans state landscaping would screen three sides – northwest, southwest, and southeast - of the proposed equipment shelter. The Town Staff Report states that the proposed tower would be painted with a matte finish in a color subject to Town Council approval and designed to blend into surrounding vegetation. The Applicant's SEPA checklist states that the proposed tower would appear similar in color to the existing tower, a dark brown hue. The proposed equipment shelter would also be painted with neutral earth-tone colors similar to the existing equipment shelter on the subject property. *Exhibit 3; Exhibit 4; Exhibit 11; Exhibit 14, Staff Report, page 6.*

13. Mona Green, Town Planner, testified that the existing pedestrian path adjacent to the proposed wireless facility and equipment shelter is located within Washington State Department of Transportation (WSDOT) right of way (ROW), so the proposed facility and equipment shelter is directly adjacent to WSDOT ROW. Ms. Green testified that changes will be made to the Hunts Point access from SR 520 in 2011. The Town Staff Report states that the existing SR 520 off-ramp would be relocated from the east to the west side of 84th Avenue NE, allowing the existing off-ramp to be part of a new landscaped highway lid. As depicted on an Urban Design Criteria diagram for SR 520, the existing pedestrian path would lie on the north boundary of a proposed green space

that would be constructed to extend south over the full width of SR 520. The proposed wireless facility and existing equipment shelter would be located directly across the existing path from the proposed lid area. As stated on the Urban Design Criteria diagram, vegetation would be planted to create a visual buffer between SR 520 at lid edges and maintain an inward-looking sensibility. The lid would be comprised of a central green open space with trails and a seating area and landscaped buffers at edges. The Town Staff Report states that once highway improvements are complete, the proposed wireless facility would be located in the middle of the landscaped area of the lid. *Exhibit 14, Staff Report, page 2; Exhibit 15; Testimony of Ms. Green.*

14. Heather Smith, Town resident, testified that the Town's website refers to nature and sylvan beauty, that nature is a main element of the Town, and that the proposed "lid" over SR 520 would approximately double the size of green space in the Town.[6] *Testimony of Ms. Smith.*

15. Ms. Smith testified that the proposed wireless facility, including the tower, would impact those living north and south of SR 520 as well as Park users. Ms. Smith testified that there are otherwise no utility poles located in Hunts Point, only lamp posts; that the existing tower is the only pole; and that the existing tower is noticeable upon entry to the Town, creating a significant aesthetic impact. Dave Bocek testified to oppose the proposed use, citing his concern that the proposed tower is too high and large in diameter and that the proposed equipment shelter is too large in size for the Park. Mr. Bocek also testified that generators necessary to operate the proposed use would be noisy, and the proposed use would require an access road where none has been proposed. *Testimony of Ms. Smith; Testimony of Mr. Bocek.*

16. Mr. Cagan responded for the Applicant that park land is the highest priority area for locating wireless facilities within the Town under HPMC location criteria. HPMC 18.43.005 establishes an order of priority for locating new wireless facilities within the Town, and provides that the first priority shall be to locate new wireless facilities on public property. According to Town code, second priority shall be placing antennas on appropriate rights-of-way and existing structures such as public buildings. Third priority shall be locating new wireless facilities on private property, and shall only occur under certain conditions. *HPMC 18.43.005(1); HPMC 18.43.005(2).*

17. Mr. Cagan also responded for the Applicant that he attended three or four Town Council meetings to discuss the proposed use before submitting a SUP application. Mr. Cagan testified that the Applicant has not fully considered an access to the proposed facility for

[6] The Town website states "Residents relish the sylvan nature of Hunts Point and the privacy that comes with living in an urban forest. " *See* http://www.huntspoint-wa.gov/ , last accessed May 28, 2010.

re-fueling, and that the Bellevue Fire Department had not yet approved the site design.[7] Mr. Cagan also testified the Applicant considered alternate locations for the proposed wireless facility, but that WSDOT does not allow any encumbrances on ROW during proposed lid and related construction – a period of six years – and the Applicant did not find any other suitable sites for the proposed facility. Ms. Smith testified to inquire whether the Applicant considered a Yarrow Point or Town location within the existing Wetherill Nature Preserve, or Fairweather Park in Medina. Mr. Cagan responded that the Applicant had not considered a location in the nature preserve and that the location in Fairweather Park would be in WSDOT ROW and thus not permitted. No letters or other documents were submitted from WSDOT to corroborate the testimony of Mr. Cagan. *Testimony of Mr. Cagan; Testimony of Ms. Smith.*

18. The project narrative submitted with the SUP application states that no other suitable structures or towers to host the Applicant's antennas and equipment exists within a one-quarter mile radius of the proposed site, either within or outside the Town. The project narrative states that ROW adjacent to SR 520 in the Town of Clyde Hill was also evaluated, but the Applicant found the ROW lacked space for necessary equipment. *Exhibit 1.*

19. The Applicant's SEPA environmental checklist states that diesel generators would operate within the proposed equipment shelter in the event that electrical power to the proposed wireless facility is interrupted. The SEPA checklist also states that noise would be generated during the approximately two days needed to construct the proposed facility, and the proposed facility's electrical cabinet cooling fans inside the proposed equipment shelter would also generate some noise during facility operation. According to the SEPA checklist, soundproofing panels would reduce noise impacts to the south and west to meet local code noise standards. *Exhibit 11.*

20. HPMC 18.43.008(7) does not permit signals, lights, or signs on antennas or facilities unless required by the Federal Communications Commission (FCC) or Federal Aviation Administration (FAA). The Town Staff Report states the Applicant has not proposed any signals, lights, or signs. *HPMC 18.43.008(7); Exhibit 14, Staff Report, pages 6 – 7.*

21. Ms. Green testified to her opinion as a professional planner for the Town that the proposed wireless facility may not allow for co-location. She noted that the request to replace the existing tower with a tower providing co-location opportunities for additional carriers may not actually allow for additional carriers, because the three existing applicants (Clearwire, T-Mobile and Verizon) would use the tower to a height well below that of the existing tower. Thus, the tower may not be of sufficient height to accommodate a fourth carrier. She also noted that the proposed facility may not require an equipment shelter as large as proposed, given that the proposed tower could likely be

[7] Exhibit 2 includes documents stating the Bellevue Fire Department reviewed and approved proposed project site plans on March 17, 2010 for generator location only. The documents states that the Fire Department requires full details on the fuel tank to approve location of the generator and fuel tank. *Exhibit 2.*

shorter than proposed since it would not accommodate an fourth carrier anyway and could be designed for the three applicants alone. *Testimony of Ms. Green, cf. Exhibit 4, Sheet A-3.0.*

22. Derrick Priebe responded for the Applicant that batteries and radio switching equipment necessary to operate the proposed use would be approximately 15 feet long and space for air circulation is needed around batteries and equipment. Mr. Priebe acknowledged space for a future tenant could be added to the proposed equipment shelter later if another wireless carrier tenant were secured. Mr. Priebe added that more space is needed for Verizon because Verizon operates on three separate frequencies. Mr. Priebe also testified that the existing 77-foot tall tower is problematic for all carriers – Verizon, T-Mobile, and Clearwire - because the Clearwire signal is only able to operate from a space between 67- and 77-feet high on the tower. *Testimony of Mr. Priebe.*

23. According to the Applicant's *SEA Hunts Point RF Justification* by Verizon Wireless Network Engineering (Verizon RF Justification), wireless signal coverage for SR 520, Evergreen Point, Hunts Point, and Yarrow Point is currently being provided by Verizon's existing SEA Fairweather site, which must be removed as a result of the SR 520 expansion project. The Verizon RF Justification states the proposed use on the subject property is a replacement site to provide wireless signal coverage to approximately the same stretch of SR 520, the Town, Evergreen Point, and Yarrow Point, and concludes that terrain topography and tree heights in the vicinity of the subject property require that a wireless signal be broadcast from the subject property at a height of at least 70 feet to be viable. According to the Verizon RF Justification, antenna heights lower than 70 feet would cause the wireless signal to be blocked and attenuated. *Exhibit 16.*

24. The Town Staff Report states that the existing tower was constructed with an assurance from the Applicant Clearwire that the tower would allow for co-location of other service providers. No other provider has co-located on the existing tower. In addition, a letter from the current Applicant to the Town dated February 10, 2010 states:

> The current pole is constrained by both height and width. As a result, the existing pole is not technically feasible for co-location by the proposed applicants. As the number of embedded antennas is proposed to increase with the requirement of four wireless service providers, so too does the importance and limitation of the pole diameter. This is partly due to an increase in the number of coaxial cables required for signal transmission and the size of the actual wireless antennas.

The letter also states that the Applicant proposes co-location of a fourth service provider in the future, although the SUP application "only speaks in regard to the current capacities of our existing coverage in the area and we are not able to discern what another carrier may need for future proposed coverage." The letter concludes that "without modification of the existing facility to include other carriers, regular wireless voice, data, and emergency service to the area would be severely and adversely affected," and the

proposed design is the minimal width and height possible with existing technology to enable co-location of four service providers and to provide adequate wireless coverage from those carriers. *Exhibit 1; Exhibit 2; Exhibit 14, Staff Report, page 5.*

25. The Town Staff Report concludes that the existing tower constructed for Clearwire was not designed to accommodate additional providers for co-location, given the proposal to construct a taller replacement tower and that space for a fourth service provider should be eliminated from the proposed tower, reducing tower height by approximately 10 feet and tower width appropriately. The Staff Report also concludes that the Applicant has not provided information that the size of the proposed equipment shelter is the minimum necessary to operate proposed facilities. *Exhibit 14, Staff Report, pages 5 and 7.*

26. Clearwire US, LLC stated in a November 25, 2009 agreement that it would negotiate in good faith with the Town to establish co-location of additional wireless service facilities by other providers on the Clearwire facility proposed for the subject property, and construction of the antenna and an antenna support structure would accommodate co-location of additional facilities or antennas for future users. *Exhibit 5.*

27. HPMC 18.43.007(2) requires the Applicant to submit a landscape plan for the proposed facility; however, HPMC 18.43.009(1) provides that the Town may permit any combination of existing vegetation, topography, or other features instead of landscaping if they achieve the same degree of screening as the required landscaping. *HPMC 18.43.007(2); HPMC 18.43.009(1).* The Town Staff Report states that the Applicant has not yet submitted detailed landscape plans, and that actual landscape materials should be chosen in conjunction with proposed SR 520 improvements and proposed landscaped SR 520 lid with final design approval by the Town Council. *Exhibit 14, Staff Report, page 10.*

28. Existing and proposed wireless signal coverage maps submitted by T-Mobile and Verizon show that the proposed use would provide greater indoor/in building coverage in the Town and vicinity, replacing areas of only in-vehicle coverage in the Town and vicinity. Existing and proposed wireless signal coverage maps submitted by Clearwire show that a signal projected from the existing tower at 75 feet above ground level would provide in-building coverage to a smaller area in the Town and in the vicinity than a signal projected from the proposed tower at 95 feet above ground level, replacing areas of only in-vehicle coverage. *Exhibit 6.*

29. The Applicant's project narrative states that the proposed use would not interfere with the reception or transmission of other legally licensed commercial or private facilities, including emergency services. According to a FCC Radio Station Authorization submitted by the Applicant, the Applicant is currently licensed by the FCC to provide wireless broadband services. The license for T-Mobile expires April 28, 2017, and the license for Verizon expires October 1, 2014. *Exhibit 1; Exhibit 8.*

30. The 1996 Federal Telecommunications Act expressly prohibits local officials from any claims that radiofrequency (RF) emissions may cause health problems, when proposed wireless communication facilities comply with FCC RF exposure limits. *47 U.S.C. s. 332(c)(7)(B)(iv).* The Applicant submitted an affidavit of qualification and certification by a radio engineer and licensed professional engineer that ground-level RF exposure for the proposed wireless facility would comply with current FCC and local rules regarding public exposure to RF electromagnetic fields. *Exhibit 9.*

31. **Based on findings and conclusions drawn from exhibits and testimony in the record at the time of the hearing, the Hearing Examiner denied the request without prejudice on June 1, 2010. The Hearing Examiner concluded that the record did not contain substantial evidence to support a conclusion that the proposed wireless service facility was designed to be the least intrusive as practicable to satisfy the wireless communication objectives of the proposed use, as required by HPMC 18.43.013(4) SUP review criteria, or that the proposed facility would comply with Ch. 18.43 HPMC design criteria. The Hearing Examiner concluded that there was not substantial evidence to show that the proposed equipment shelter associated with the wireless service facility would comply with Ch. 18.43 structure size limitations or be designed to be as least intrusive as practicable; that the proposed wireless service facility could not be located within the WSDOT right-of-way (ROW) during or following construction of ROW improvements; or that the proposed wireless facility would be designed to accommodate co-location under Ch. 18.43 HPMC design standards.** ***Findings, Conclusions, and Decision of the Town of Hunts Point Hearing Examiner, Cell Tower and Wireless Communication Facility SUP, No. 09-01, dated June 1, 2010.***

32. **The Applicants Verizon Wireless and T-Mobile filed separate requests for reconsideration and to re-open the record on the request under Hunts Point Municipal Code 2.35.110 on June 15, 2010. The Hearing Examiner granted the request on June 22. 2010.** ***Verizon Wireless's Request for Reconsideration and to Re-Open the Hearing and Notice of Appearance, dated June 15, 2010; T-Mobile's Request for Reconsideration and Notice of Appearance, dated June 15, 2010.***

33. **At the re-opened hearing, Matt Cagan, Cascadia PM, testified for the Applicants that Revised Project Drawings, dated July 20, 2010 (Ex. 19a), replace the Plan Set, dated February 2, 2010 (Ex. 4). Mr. Cagan testified that the July 20, 2010 revised drawings depict an equipment shelter reduced in size from 726 to 415 square feet; eliminate the previously-proposed Verizon back-up generator from the proposed use; reduce the width of the equipment shelter from 17 to 15 feet for the T-Mobile portion of the use;[8] and reduce the diameter of the proposed wireless tower from 36 to 32 inches in diameter.** ***Exhibit 19; Testimony of Mr. Cagan.***

[8] **Mr. Cagan testified for the Applicants that the Verizon Wireless portion of the proposed use would use different transmission equipment of a different size than the equipment needed for T-Mobile, so equipment shelter width cannot be reduced for the portion occupied by Verizon Wireless. A letter from Matt Cagan to**

34. **Town Planner Mona Green testified at the re-opened hearing that the proposed equipment shelter should be evaluated under Town special use permit ordinances, not Town variance ordinances. HPMC 18.43.008(8)(a) permits the Town, in its sole discretion, to approve multiple equipment structures, one or more larger structures, or multiple structures for multiple applicants, depending upon aesthetics and other issues.[9]** ***HPMC 18.43.008(8)(a); Testimony of Ms. Green.***

35. **Derrick Priebe, Telco Pacific, for T-Mobile, testified that the existing wireless service facility is located at the NE 28th/84th Avenue NE intersection, within the WSDOT SR-520 ROW. A June 14, 2010 letter from Patrick Sullivan, WSDOT Wireless Leasing/Special Projects Manager, states that the Verizon Wireless, T-Mobile, and Sprint/Nextel facilities currently located within the SR-520 ROW will need to vacate. The letter states that WSDOT cannot allow permanent wireless facilities prior to and during construction of the SR-520 - Medina to SR-202 Eastside Transit and HOV Project (Project), nor can WSDOT guarantee future placement of permanent facilities following Project completion. The letter adds that wireless carriers currently located in the ROW have received letters of lease termination.** ***Testimony of Mr. Priebe; Exhibit 19.d.i.***

36. **A July 19, 2010 letter from KV Lew P. Eng and Kurt W. Groesch, Adapt Engineering, Inc. states that if a "stealth" or "flagpole" design is used for the proposed wireless facility, the minimum height of the proposed wireless tower necessary to meet safety requirements and function satisfactorily within the Clearwire. T-Mobile, and Verizon Wireless networks is 97 feet high with a pole diameter of 32 inches wide. The letter states that a stealth design means that all of**

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the Town states Verizon Wireless requires an approximately 250-square foot space and T-Mobile requires an approximately 165-square foot space within the proposed equipment shelter, for a total floor area of approximately 415-square feet. According to a letter from Richard J. Moss for the Applicant Verizon Wireless, the equipment required to transmit the Verizon Wireless signal from the proposed wireless facility consists of three Alcatel-Lucent Cellular RF Frames in environmental enclosures, measuring 35.4" x 37.8" x 76"; one Emerson Network Power NetXtend Cell Site Series Power Bay in environmental enclosure, measuring 32" x 45-1/2" x 87-5/8"; and one Emerson Network Power NetXtend Cell Site Series Battery Bay, measuring 32" x 45-1/2" x 87-5/8". According to a letter from B.J. Thomas for T-Mobile, the equipment required to transmit the T-Mobile signal from the proposed wireless facility consists of a Purcell rack/cabinet for conversion of the AC power to DC; DC power distribution shelf ; strings of batteries for back-up power during distribution outages; three Nokia FCOA cabinets for installation of Nokia Flexi UMTS/GSM system/radio modules; a multi-carrier power amplifier; AC electrical panel with transient voltage surge protection; telco demark; and exhaust fan or air conditioning as needed. ***Exhibit 19.b.i; Exhibit 19.b.ii; Exhibit 19.b.iii; Testimony of Mr. Cagan.***

[9] HPMC 18.43.008(8)(a) provides: "The maximum floor area is 200 square feet and the maximum height is seven feet. Except in unusual circumstances or for other public policy considerations, the equipment building may be located no more than 150 feet from the antenna or facility. Depending upon the aesthetics and other issues, the town, in its sole discretion, may approve multiple equipment structures, one or more larger structures and/or multiple structures for multiple applicants."

the wireless carriers' aerial equipment is concealed within the pole, resulting in a round steel pole with three canisters stacked one on top of the other within and on top of the pole. As proposed, the base pole would contain three 10-foot long canisters attached on top of the base pole. The letter also states that a 32-inch diameter pole could still accommodate equipment necessary to provide wireless service, given the size and amount of coaxial cable that must run up through the pole and pass behind each carrier's antennas. T-Mobile and Clearwire would locate three panel antennas and Verizon would locate six panel antennas inside the stealth pole; Clearwire would locate two microwave dishes within the pole.[10] To accommodate the equipment, the letter concludes the pole must accommodate 36 runs of coaxial cable, ranging in diameter from 7/8-inches to 1-5/8-inches, and six runs of 1/2-inch coaxial cable. ***Exhibit 19.c.i.***

37. **Revised project drawings dated July 20, 2010, depict the center of the proposed Verizon Wireless canister at approximately 69 feet 11 inches tall; the proposed T-Mobile canister at approximately 82 feet tall; and the proposed Clearwire antennas at approximately 92 feet four inches tall. The top of the proposed tower is 97 feet tall. The center of an area for a future co-locator would be located at approximately 62 feet high along the proposed tower.** ***Exhibit 19.a.***

38. **At the July 20, 2010 re-opened hearing, Heather Smith testified to inquire why the proposed pole is the minimum height necessary, and to inquire why different wireless carriers would be located at different heights along the pole.** ***Testimony of Ms. Smith.***

39. **Chris Martin, Radio Frequency Engineer, for T-Mobile, responded that different wireless carriers use different radio frequencies to broadcast a wireless signal, so the frequencies must be emitted from different heights to achieve similar coverage over a given area. Frequencies are licensed by the Federal Communications Commission (FCC).** ***Exhibit 22; Testimony of Mr. Martin.***

40. **A letter from Mr. Martin, dated July 20, 2010, states that the Applicants would need to use a "top hat" pole design if wireless carriers were located at the same height along the proposed pole. Instead of carrier equipment concealed inside a vertical stealth pole, with equipment canisters stacked one on top of the other, a "top hat" pole would consist of a pole with all equipment located at the very top of the pole with each carrier's equipment separated horizontally from other carrier's equipment. The letter states that, for proper signal function, T-Mobile requires at least 10 feet of horizontal separation between T-Mobile equipment and another**

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[10] A July 16, 2010 letter from Ross Galang, Clearwire Microwave Engineer, states that Clearwire must install two 24-inch diameter microwave radio dishes within the proposed wireless facility to support emergency 911 and other emergency services; provide reliable and fast signals, especially for customers subscribing to Voice Over Internet Protocol (VoIP) services, and to comply with engineering and design constraints set by the American National Standards Institute (ANSI). *Exhibit 19.c.iii.*

wireless carrier's equipment. If equipment were located within a vertical stealth pole, T-Mobile requires at least four feet of vertical space separating wireless carriers' equipment. The letter states that the antenna separation is needed to eliminate the possibility of inter-modulation effects between carriers, which could degrade quality of wireless service. The letter concludes that separation space necessary to prevent modulation -- combined with physical space required for antennas, mounting brackets, low noise amplifiers (LNA), and coaxial cabling between the antennas and base station -- requires a minimum 10-foot long canister within a stealth pole in which each wireless carrier may locate its equipment. *Exhibit 19.c.ii.*

41. Mr. Martin's July 20, 2010 letter states the proposed 97-foot tall wireless pole reserves space for one more wireless service carrier's equipment, in addition to the Applicants. The letter states that the space reserved would reasonably meet the needs of an average carrier as can best be determined at this time, which include the need to locate three panel antennas, 12 coaxial cables, and a ground equipment area within or in the vicinity of the stealth pole. The letter adds that it is not possible for the Applicants to predict the exact needs of a potential future fourth carrier, as each carrier's system functions differently depending upon radio frequencies, technologies, and equipment types and configurations. *Exhibit 19.c.ii.*

42. Mr. Martin's letter states the SUP request is an attempt to replace coverage that would be lost when the current wireless facility within the SR-520 ROW is removed, as required by WSDOT. The letter states that without the existing site or another comparable wireless facility in the area of the existing site, T-Mobile would experience a significant gap in its wireless service in the area. The letter adds that without the existing or another comparable site, in-building signal coverage and coverage within the SR-520 corridor would be reduced including coverage necessary to place 911 emergency calls from vehicles within the SR-520 corridor. The letter states that the proposed facility would provide the same signal coverage to Hunts Point residents as currently received through the existing facility with a T-Mobile antenna placed 82 feet high along the proposed stealth pole. *Exhibit 19.c.ii.*

43. A statement by Jonathan L. Kramer,[11] dated August 20, 2010, notes that he conducted an examination Exhibits 16 and 17 at the request of the Town. He concluded that the Verizon wireless signal maps provided within Exhibit 16 do not show objective signal strength of a received wireless signal; do not provide an objective basis for concluding there would be an insufficient received wireless signal; do not prove that the Verizon signal would be subject to a significant gap in service if the proposed use is not approved; nor does that exhibit support a

[11] Jonathan L. Kramer is a holder of multiple Federal Communications Commission (FCC) radio frequency licenses, is a wireless site planner, radio frequency engineer, and Attorney at Law. Mr. Kramer provided the sworn statement dated August 20, 2010, as a witness for the Town of Hunts Point. *Exhibit 21.*

conclusions that Verizon requires a particular height for its antennas on the proposed replacement pole. Mr. Kramer also states that T-Mobile maps provided within Exhibit 17 show T-Mobile would achieve outdoors-level coverage throughout Hunts Point without the existing wireless facility; and that the maps do not show T-Mobile requires any particular height for its antennas on the proposed replacement pole. ***Exhibit 21.***

44. **Verizon Wireless SEA Hunts Point Replacement Site Supplemental Data and Analysis (Verizon Analysis) supplements the SEA Hunts Point RF Justification, Verizon Wireless Network Engineering (Ex. 16) and responds to the August 20, 2010 Kramer statement. The Analysis states the coverage objective of the proposed wireless facility is to replicate the existing coverage provided by the existing wireless site, which would include reliable in-vehicle coverage along SR-520 and in-building coverage to Hunts Point residents.** ***Exhibit 23.***

45. **The Verizon Analysis explains that in-building wireless coverage is needed to meet customer demand for use of wireless devices freely inside homes without losing a wireless signal, including demand by customers who no longer use land line phones or wired broadband Internet connections. The Verizon Analysis characterizes Hunts Point as a town containing large, well-constructed homes with ample tree landscaping. The Verizon Analysis also explains that in-vehicle coverage is required for wireless device use inside vehicles, including emergency 911 calls.** ***Exhibit 23.***

46. **The Verizon Analysis states that Verizon defines -75 decibel milli-Watts (dBm) or stronger as the needed signal strength for in-building coverage; -84 dBm or stronger as needed for in-vehicle coverage; and -95 dBm as needed for outdoor-only use.[12] The strongest signal of -75 dBm is required for in-building coverage to ensure that the signal is strong enough to survive signal losses experienced when the signal passes through building walls. According to the Verizon Analysis, radio signals can decrease by up to 40 dB due to wall thickness, construction material, and window coatings. In vehicles, the signal must be strong enough to withstand signal loss occurring when the signal passed through windows and materials forming the outer body of the vehicle. Outside, the signal must be strong enough to withstand signal loss from the hand or body and for a limited amount of change due to environmental and dispersion factors. According to the Verizon Analysis, the outdoor-only coverage signal threshold would not be strong enough to provide**

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[12] **The closer a signal strength is to zero, the stronger the coverage signal level. For example, a level of -70 dBm is stronger than a level of -90 dBm. In general, Verizon signal strength thresholds for in-building, in-vehicle, and outdoor-only coverage depend on many factors, including receiver sensitivity of the mobile device; receiver noise figure; antenna design relative to isotropic or dipole; fade margins; and variability of clutter to disperse and change electromagnetic signals. For example, geographic areas with wetter climates and diverse changing foliage conditions will have greater variability of dispersion and change and thus a higher signal coverage threshold than geographic areas that are arid and contain sparse trees.** ***Exhibit 23.***

sufficient signal coverage for reliable and consistent use of mobile devices within buildings or vehicles. ***Exhibit 23.***

47. **The Verizon Analysis states that a significant gap in in-vehicle and in-building coverage would arise with the removal of the existing wireless facility and failure to replace the facility with the proposed facility. Signal coverage plot maps submitted with the Verizon Analysis depict levels of outdoor-only Verizon coverage signal strength within several areas of Hunts Point and the vicinity with the removal of the existing wireless facility and without the proposed wireless facility. The maps indicate that dropped calls and lack of signal would be experienced in vehicles traveling along SR-520 between 84th Avenue NE and 92nd Avenue NE, and along NE 28th Street between Hunts Point Road and 92nd Avenue NE. Dropped calls and lack of signal would occur in homes in the following neighborhoods: peninsula and southeast portion of Hunts Point, east side of Evergreen Point along NE 32nd Street, 78th Pl N, along Evergreen Point Road south to NE 24th Street, along the west side of Yarrow Point, and south of SR-520 along Points Drive and 92nd Avenue NE.** ***Exhibit 23.***

48. **With the proposed wireless facility emitting a Verizon wireless signal at 70 feet in height, the signal plot maps submitted with the Verizon Analysis depict in-building coverage signal strength extending throughout Hunts Point and the vicinity, with small areas of in-vehicle coverage only located at the north tip of the Hunts Point peninsula, the east shore of Lake Washington southwest of Hunts Point, and at the north tip of the Yarrow Point peninsula. The Verizon Analysis states that the proposed wireless facility would fill the coverage gap without the existing facility. The Verizon Analysis states that 70 feet tall is the minimum Verizon antenna height required for the Verizon coverage signal to overcome topography and foliage in the vicinity of Hunts Point Park and meet signal coverage thresholds. Signal plot maps for an antenna at 60 feet high and 50 feet high show significantly greater areas of in-vehicle only and outdoor-only coverage in the Evergreen Point area, east shore of Lake Washington southwest of Hunts Point, the Hunts Point peninsula, the Yarrow Point peninsula and the area immediately east of Hunts Point, south of the SR-520/Lake Washington Blvd NE intersection.** ***Exhibit 23.***

49. **A Declaration of Chris Martin, Radio Frequency Engineer for T-Mobile states that T-Mobile would experience a significant gap in signal coverage in Hunts Point and adjoining portion of SR-520 without the existing facility and without the proposed facility. Without the existing facility or proposed facility, signal propagation maps submitted with the Martin Declaration depict in-building T-Mobile signal strength across the southeast portion of Hunts Point and south portion of Evergreen Point, extending south into the Clyde Hill and Overlake areas, with in-vehicle or outdoor-only coverage across much of the Hunts Point peninsula, east portion of Hunts Point, and north portion of Evergreen Point. Outdoor only coverage would extend over significant areas of the Hunts Point peninsula, Evergreen Point, and Yarrow**

Point. The Martin Declaration states that outdoor-only coverage is not adequate to meet customer demand, as the majority of wireless communications are made from inside buildings or vehicles. According to the Martin Declaration, the existing wireless facility provides reliable in-building coverage to significant portions of Hunts Point, in-vehicle or better coverage along SR-520, and reliable signal transfer to other T-Mobile wireless facilities in the vicinity of the existing facility. ***Exhibit 22.***

50. **According to the Martin Declaration, the strength of the T-Mobile wireless signal needed to provide in-vehicle coverage is -84.4 dBm, and the strength needed to provide in-building coverage is -76 dBm, given the minimum level necessary for a common T-Mobile telephone or wireless device to reliably operate, -102 dBm, and the degradation of the T-Mobile signal as it leaves the T-Mobile antenna and reaches the telephone or wireless device. Mr. Martin testified that T-Mobile's wireless coverage reliability goal is to provide in-building coverage 95 percent of the time within a defined area. The signal degrades due to signal blocked by the user's body, the structure in which the user in located and the change in signal strength as the user moves. The Martin Declaration states the proposed facility is necessary to replace the T-Mobile wireless service that would be lost upon removal of the existing facility; to provide reliable in-building coverage within Hunts Point, along SR-520; and to ensure reliable data and call transfer from one facility to another as a customer moves through the area in the vicinity of Hunts Point.** ***Exhibit 22; Testimony of Mr. Martin.***

51. **The Martin Declaration states that the existing signal from other wireless facilities in the vicinity of Hunts Point is not adequate to cover the volume of calls and data transmissions currently served by the existing facility. The current level of calls and transmissions served by the existing facility would be dropped or not completed without the existing facility or proposed facility, and the performance of neighboring wireless sites would be negatively impacted. The Martin Declaration also states it would not be possible to turn up the power on neighboring sites to fill the gap created by removal of the existing site, since signals from one site would interfere with signals from other neighboring sites resulting in dropped calls, lost data connections and unacceptably slow data connection speeds. According to the Martin Declaration, signal control is accomplished through careful site placement and height of antennas. The propagation maps submitted with the Martin Declaration show the greatest combined area of in-building and in-vehicle coverage in Hunts Point with a T-Mobile antenna placed at 82 feet high on the proposed stealth pole, and that in-building and in-vehicle coverage area would decrease as the T-Mobile antenna is reduced in height. Mr. Martin testified that areas of Clyde Hill would receive improved signal coverage over existing conditions with the proposed wireless facility at a T-Mobile antenna height of either 70 feet high or 82 feet high.** ***Exhibit 22; Testimony of Mr. Martin.***

52. **The Town Staff Report, dated May 13, 2010, states that "should the Hearing Examiner grant the SUP application, the following conditions are suggested:**

1. **The equipment building shall be the minimum size necessary. The design for the building shall be architecturally compatible with other structures on Town property, including plans for a new Town Hall and landscape improvements for the SR-520 lid. Approval of the design shall be at the sole discretion of the Town Council.**

2. **A Site Development Permit and a Building Permit application shall be filed within 18 months of Special Use Permit approval.**

3. **The antenna support structure shall be the minimum height necessary to provide service to the three carriers. Tower width shall be reduced accordingly. Space for a fourth co-locator shall be eliminated to reduce tower width and height.**

4. **Permits for the equipment building and the antenna support structure shall not be issued independently.**

5. **The proposed propane tank and emergency generator location shall be approved by the City of Bellevue Fire Marshal as well as the Town of Hunts Point.**

6. **Exterior lighting shall be prohibited.**

7. **A lease agreement with the Town of Hunts Point shall be executed prior to submittal of any applications for construction of the facilities."**

Exhibit 14, Staff Report, page 12. **No Applicant objected to any of the proposed conditions.**

53. **At the March 15, 2012 open record hearing, Gibran Hashmi, Verizon Wireless & Clearwire US Representative, requested clarification of Condition No. 2. He noted that the condition does not state the consequences if the term of the condition is not met. He noted the consequences could include a revocation of the permit approval, and that he would like to avoid that possibility. He requested an extension of time so that there would be no consequences.**

Mr. Hashmi testified that much progress has been made toward submittal of a building permit. He stated that a lease agreement has been executed with the Town and construction drawings are ready to submit to the Town, but submittal has been delayed due in part to health issues experienced by key Applicant personnel. George Johnston, T-Mobile Representative, testified that attempts to get two leases in place became complicated over time, so T-Mobile will now sub-lease from Verizon Wireless. Mr. Hashmi requested that Condition No.2 be clarified to allow a

six-month extension of time for completion, until September 16, 2012. ***Exhibit 27; Testimony of Mr. Hashmi; Testimony of Mr. Johnston.***

54. **Mona Green, Town Planner, testified that clarification of the condition to provide an extension of time does not obligate the Applicant to begin work, but construction would be least disruptive if it would occur during ongoing SR 520 highway construction activities. Ms. Green testified that construction occurring after SR 520 highway construction activities are completed would be very visible and adverse to the interests of Town citizens. A Memorandum from Ms. Green dated March 9, 2012 states Town staff supports the extension request.** ***Exhibit 25; Testimony of Ms. Green.***

CONCLUSIONS

Jurisdiction

The Hearing Examiner has authority to review requests for special use permits, and may approve, conditionally approve or deny the requested special use permit. *HPMC 18.43.013(1).* The Hearing Examiner's decision to approve, conditionally approve or deny a special use permit shall be in writing, and such findings of fact and conclusions shall be supported by substantial evidence in the administrative record.[13] Any conditions imposed must be based on the purposes and policy statement of HPMC Ch. 18.43, as set forth in HPMC 18.43.001 and 18.43.002. *HPMC 18.43.013(5).*

Summary of Argument Presented

Charles E. Maduell, Attorney at Law, presented argument for Applicant Verizon Wireless at the July 20, 2010 and September 2, 2010 re-opened hearing. Attorney Maduell argued that the proposed wireless facility is no higher than necessary to replicate the coverage of the existing wireless facility, by filling coverage gaps that would be created through removal of the existing facility and providing coverage necessary to respond to consumer demand.

Molly A. Lawrence, Attorney at Law, presented argument for Applicant T-Mobile at the July 20, 2010 and September 2, 2010 re-opened hearing. Attorney Lawrence argued that the Kramer report submitted by the Town of Hunts Point does not speak to the height of the proposed tower required for signal propagation; rather, tower height proposed by the Applicants is the minimum height necessary for signal propagation, to fit into the existing grid system of wireless facilities in the vicinity of the existing facility, and to close the signal coverage gap that would be created upon removal of the existing wireless facility. Attorney Lawrence argued that the in-building level of coverage is the industry standard and outdoor-only coverage is not sufficient.

Margaret King, Attorney at Law, presented argument for the Town of Hunts Point at the July 20, 2010 and September 2, 2010 re-opened hearing. Attorney King argued that the proposed wireless facility may not be designed to be the least intrusive under the HPMC because the

[13] "Substantial evidence" is not defined by the Hunts Point Municipal Code (HPMC). "Substantial evidence" has been defined by the Washington Supreme Court as "evidence sufficient to persuade a fair-minded person of the order's truth or correctness." *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685 (2002).

proposed facility would provide superior signal coverage to the existing facility. Attorney King argued that the Applicants' approach to analyzing coverage area was incorrect, but did not offer an alternative approach. Attorney King requested that the proposed use should be denied upon re-opening the record, because there is insufficient information in the record to show that the proposed facility would be least intrusive as practicable.

Criteria for Review

Under HPMC 18.43.013(4), special use permits (SUP) are required for wireless facilities and antenna facilities proposed to be more than 26 feet in height. Every application for a SUP shall be reviewed by the Hearing Examiner for compliance with the development standards in Ch. 18.43 HPMC. The Hearing Examiner may approve or conditionally approve an application for a SUP meeting all of the development standards in Ch. 18.43 HPMC, as long as the applicant also demonstrates compliance with the following:

1. There will be no injury to the neighborhood or other detriment to the public welfare;

2. There is a need for the proposed facility or antenna to be located in or adjacent to the residential area, which shall include documentation of the procedures involved in the site selection and an evaluation of the alternative sites and existing facilities on which the proposed facility or antenna could be located or co-located;

3. The facility or antenna shall be designed to be as least intrusive as practicable, including, but not limited to, the exterior treatment of the facility so as to be harmonious with the character of the surrounding neighborhood, the use of landscaping and privacy screening to buffer the facility and activities on the site from surrounding properties and that any equipment that is not enclosed shall be designed and located on the site to minimize impacts related to noise, light and glare onto surrounding properties; and

4. In those situations where strict application of the standards in this chapter would result in the applicant's inability to provide telecommunications services or if the applicant claims that the application of this chapter would unreasonably discriminate among providers of functionally equivalent services, the applicant shall provide a written statement which provides detailed information supporting this claim(s).

HPMC 18.43.013(4).

The Ch. 18.43, HPMC development standards are the following:

1. Design Criteria:
   a. Co-location. New facilities shall be designed to accommodate co-location, unless the applicant demonstrates why such design is not feasible for economic, technical or physical reasons;
   b. Architectural Compatibility. Facilities shall be architecturally compatible with the surrounding buildings and land uses in the town, and screened or otherwise integrated, through location and design, to blend in with the existing characteristics of the site;
   c. All facilities shall comply with the minimum setback requirements of the area in which they are located. A special use permit shall be required to vary from the minimum setback requirements, and may only be granted if there are unusual geographical limitations or other public policy

considerations as determined in the sole discretion of the town. Such considerations shall include by way of illustration, and not limitation, the following: (a) Impact on adjacent properties; (b) Alternative sites for personal wireless service facilities; (c) The extent to which screening and camouflaging will mitigate the effects of the wireless facilities[14];

d. View Corridors. Due consideration shall be given so that placement of towers, antennas and personal wireless service facilities do not obstruct or significantly diminish currently existing views of Lake Washington and surroundings;
e. Color. Antennas and facilities shall have a color generally matching the surroundings or background, in such a way that visibility is minimized, unless a different color is required by the FCC or FAA;
f. Lights, Signals and Signs. No signals, lights or signs shall be permitted on antennas or facilities unless required by the FCC or FAA. Should lighting be required, in cases where there are residents located within a distance which is 300 percent of the height of the antenna, then dual mode lighting shall be requested from the FAA;
g. Equipment Structures. Ground level equipment, buildings, and the tower base shall be screened from public view. The standards for equipment buildings are as follows: (a) The maximum floor area is 200 square feet and the maximum height is seven feet. Except in unusual circumstances or for other public policy considerations, the equipment building may be located no more than 150 feet from the antenna or facility. Depending upon the aesthetics and other issues, the town, in its sole discretion, may approve multiple equipment structures, one or more larger structures and/or multiple structures for multiple applicants; (b) Ground level buildings shall be screened from view by landscape plantings, fencing, or other appropriate means, as specified herein or in other town ordinances or codes; (c) Equipment buildings shall comply with setback requirements and shall be designed so as to conform in appearance with nearby residential structures;
h. Federal Requirements. All antennas and antenna support structures must meet or exceed current standards and regulations of the FAA, the FCC and any other agency of the federal government with the authority to regulate antennas and antenna support structures;
i. Building Codes, Safety Standards. To ensure the structural integrity of towers, antennas, antenna support structures and facilities, the applicant/owner shall ensure that they are maintained in compliance with standards contained in the applicable town building codes and the applicable standards for antenna support structures published by the EIA, as amended from time to time;
j. Structural Design. Antenna support structures shall be constructed to EIA standards, which may be amended from time to time, and to all applicable codes adopted by the town;
k. Fencing. A well-constructed wall or wooden fence not less than six feet in height from the finished grade shall be provided around each wireless service facility. Access to the facility shall be through a locked gate. The use of chain link, plastic, vinyl, or wire fencing is prohibited unless it is fully screened from public view by a minimum eight-foot wide landscaping strip. All landscaping shall meet applicable town code requirements;
l. Antenna and Antenna Support Structure Height. The applicant shall demonstrate that the antenna and antenna support structure proposed in its application is the minimum height required to function satisfactorily. No antenna or antenna support structure that is taller than this minimum height shall be approved;

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[14] Right-of-Way Setback Exception. The setback requirement may be waived pursuant to a special use permit if the antenna and antenna support structure are located in town right-of-way. *HPMC 18.43.008(4).*

m. Antenna Support Structure Safety. The applicant shall demonstrate that the proposed antenna and support structure are safe and the surrounding areas will not be negatively impacted by support structure failure, falling ice, or other debris or interference. All support structures shall be fitted with anti-climbing devices, as approved by the manufacturers;

n. Antenna Criteria. Antennas on or above a structure shall be subject to the following: (a) The antenna shall be architecturally compatible with the building and wall on which it is mounted, and shall be designed and located so as to minimize any adverse aesthetic impact; (b) Where the antenna is mounted or placed on utility poles or lighting standards, the antenna shall be designed and located so as to minimize any adverse aesthetic impact; (c) The antenna shall be mounted on a wall of an existing building on a configuration as flush to the wall as technically possible and shall not project above the wall on which it is mounted unless it must be for technical reasons. In no event shall an antenna project more than 16 feet above the roof line, including parapets; (d) The antenna shall be constructed, painted, or fully screened to match as closely as possible the color and texture of the building, wall or structure upon which it is mounted; (e) If an accessory equipment shelter is present, it must blend with the surrounding buildings in architectural character and color; (f) The structure must be architecturally and visually (color, size, bulk) compatible with surrounding existing buildings, structures, vegetation and uses; (g) Site location and development shall preserve the pre-existing character of the site as much as possible. Existing vegetation should be preserved or improved, and disturbance of the existing topography of the site should be minimized, unless such disturbance would result in less visual impact of the site on the surrounding area. The effectiveness of the visual mitigation techniques must be evaluated by the town, in the town's sole discretion;

o. Interference. No antenna shall cause localized interference with the reception of any other communications signals, including, but not limited to, public safety, television, and radio broadcast signals; and

p. Guy Wires Restricted. No guy or support wires shall be used in connection with such antenna, antenna array, or its support structure except when used to anchor the antenna, antenna array or support structure to an existing building to which such antenna, antenna array, or support structure is attached.

2. Landscaping Requirements:
   a. Landscaping, as described herein, shall be required to screen wireless service facilities as much as possible, to soften the appearance of the cell site. The town may permit any combination of existing vegetation, topography, walls, decorative fences or other features instead of landscaping, if they achieve the same degree of screening as the required landscaping; and
   b. Screening. The visual impacts of a personal wireless service facility shall be mitigated through landscaping or other screening materials at the base of the tower and ancillary structures. The following landscaping and buffering shall be required around the perimeter of the antenna and antenna support structure, except that the town may waive the standards for those sides of the facility that are not in public view. Landscaping shall be installed on the outside of fences. Existing vegetation shall be preserved to the maximum extent practicable and may be used as a substitute for or as a supplement to landscaping requirements.

Federal Telecommunications Act of 1996

In addition to considering the criteria and guidance in the Hunts Point Municipal Code, the Hearing Examiner must be cognizant of federal statues and case law decisions that impact what authority a local government has over the location of wireless communication facilities.

Federal law places certain limitations upon the power of local government to control the location of personal wireless service facilities ("wireless facilities"). *47 U.S.C. 332(c)(7)(A).*[15] Chief amongst those limitations is the preemption of control over radio frequency emissions. *47 U.S.C. 332(c)(7)(B)(iv).* As long as the wireless facility emits radio energy within the Federal Communications Commission's guidelines, local jurisdictions are forbidden from considering such emissions in decisions about placement, construction, or modification of wireless facilities.

Other restrictions include a ban on any regulations that prohibit or have the effect of prohibiting the provision of personal wireless services. *47 U.S.C. 332(c)(7)(B)(i)(II).* When applying a zoning code to a specific wireless facility site proposal, the local authority retains most of its original discretion. Both the visual impact of a wireless facility and its departure from the area's general character can be legitimate reasons for denial of a siting permit. *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 727 (9th Cir. 2005). The standard for evaluating the denial of a particular antenna site adopted is the "least intrusive" standard. *MetroPCS*, 400 F.3d at 735. Under the "least intrusive" standard, the applicant bears the burden of showing that a particular site is the least intrusive site. *See APT Pittsburgh Ltd. Partnership v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469, 479-80 (3rd Cir. 1999). If the proposed site is the least intrusive and the denial of that location would effectively prevent the applicant from providing its service in the area, then the permit must be issued. *Cingular Wireless, Inc. v. Thurston County*, 425 F.Supp.2d 1193, 1195-6 (W.D. Wash. 2006). *47 U.S.C. sec. 332(c)(7)(B)(iv).*

Conclusions Based on Findings

1. **Upon supplementation of the record by the Applicants at the re-opened hearing, the Applicants have presented substantial evidence that the proposed use would meet Ch. 18.43 HPMC design standards and HPMC 18.43.013(4) special use permit review criteria for wireless facilities.** The Washington Supreme Court defines "substantial evidence" as "evidence sufficient to persuade a fair-minded person of the order's truth or correctness." *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685 (2002). Upon examination of the administrative record for the special use permit (SUP) application, **including information submitted upon re-opening the hearing,** the

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[15] (7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

47 U.S.C. Sec. 332(c)(7).

Hearing Examiner finds ~~insufficient~~ **sufficient** evidence in the record to be able to conclude that the proposed wireless communications facility is designed to be the least intrusive as practicable to satisfy the wireless communication objectives of the proposed use, and that the proposed facility would comply with HPMC 18.43 design criteria **in the following manner:**

a. **Following re-opening the record, the Applicants have submitted information sufficient to convince a fair-minded decision maker that the Verizon Wireless antenna must be located at approximately 70 feet high on the proposed wireless tower for the Verizon coverage signal to overcome topography and foliage in the vicinity of Hunts Point Park and reliably meet in-vehicle and in-building signal coverage thresholds, and that the T-Mobile antenna must be located at approximately 82 feet high on the proposed wireless tower for the coverage signal to overcome topography and foliage in the vicinity of Hunts Point Park and reliably meet in-vehicle and in-building signal coverage thresholds. With the 10-foot tall canisters required for each carrier on the proposed tower, the proposed antennas placed in the center of each canister, and the proposed Clearwire antennas located at approximately 92 feet four inches high on the proposed wireless tower, it is practicable and least intrusive for the proposed tower to be approximately 97 feet tall. Moreover, the proposed stealth tower is less intrusive than the "top hat" configuration, the other available wireless tower configuration, as the top hat configuration would significantly expand the width and resulting visual impact of the wireless tower.** ***Findings 35 -52.***

b. **Following re-opening the record, the Applicants have provided sufficient information regarding the average space needs of any future co-locator at this time: specifically, the need to locate three panel antennas, 12 coaxial cables, and a ground equipment area within or in the vicinity of the proposed stealth pole. Information submitted by the Applicants reflects that any average, future co-locator would require at least 10 feet of vertical space within the proposed stealth pole to accommodate this necessary equipment and adequate separation to prevent signal inter-modulation which could otherwise degrade quality of wireless service. With the additional technical specifications provided by the Applicants upon re-opening the record, there is substantial evidence to support a conclusion that the Applicant could not reduce the proposed tower height and still meet the coverage needs of the three carriers and Ch. 18.43 HPMC co-location design criteria.** ***Findings 35 – 52.***

c. **Following re-opening the record, the Applicants have submitted information that the space previously set-aside for a future tenant yet to be identified has been eliminated from proposed equipment shelter design, reducing the floor area of the proposed equipment shelter to the minimum necessary to support operation of the proposed tower. The proposed equipment shelter should be evaluated under Town special use permit ordinances, not Town variance**

ordinances. HPMC 18.43.008(8)(a) permits the Town, in its sole discretion, to approve multiple equipment structures, one or more larger structures, or multiple structures for multiple applicants, depending upon aesthetics and other issues. The Town Planner did not object to the proposed 415 square foot equipment shelter, which the Applicants have reduced in size from the initially proposed shelter. The size reduction includes elimination of a back-up generator and a reduction of the width in a portion of the shelter. Exhibits admitted following re-opening the record reflect the actual measured floor area requirements of equipment necessary to transmit the Verizon Wireless and T-Mobile signal from the proposed wireless tower. The Town may, in its sole discretion, approve the proposed 415-square foot shelter with conditions of approval necessary to ensure that the Town Council will have final approval of equipment shelter design and that the Town executes a lease agreement with the Applicants prior to submittal of any applications for facility construction. ***Findings 33, 34.***

The proposed use is unique because WSDOT has required the Applicants to remove the existing wireless facility currently providing wireless signal coverage to the Hunts Point area from the SR-520 ROW, and has terminated the Applicants' lease to that ROW area. Exhibits and testimony in the re-opened record show that a coverage gap would exist upon removal of the existing wireless facility and failure to replace the existing facility with a facility comparable in signal strength, including areas of outdoor-only coverage within Hunts Point and the vicinity. While outdoor-only coverage would provide some wireless signal to these areas, exhibits and testimony in the record show that the strength of an outdoor-only signal is not sufficient to provide reliable wireless device service within buildings or within vehicles, and that a number of wireless service consumers currently demand reliable signals within buildings and vehicles. For example, some consumers maintain only a cellular phone rather than land line for phone service within their residences, and some consumers wish to place emergency 911 calls from vehicles within the SR-520 corridor and on surrounding roadways. Thus, in seeking to replace the existing wireless facility upon WSDOT termination of the Applicants' lease, it is practicable to expect that in this specific case a replacement facility would offer at least similar signal strength to similar areas as the existing facility.

DECISION

Based on the preceding Findings and Conclusions, request for a Special Use Permit to replace an existing 77-foot tall Clearwire cellular tower with a new wireless communication facility, including a 97-foot tall cellular tower, at 3000 Hunts Point Road, in Hunts Point, Washington is **APPROVED**, with the following conditions:[16]

1. The equipment building shall be the minimum size necessary. The design for the building shall be architecturally compatible with other structures on Town property, including plans for a new

[16] Conditions are necessary to ensure the proposal meets Town ordinances and specific impacts of the proposal are mitigated.

Town Hall and landscape improvements for the SR-520 lid. The Town Council shall approve the design.

2. A Site Development Permit and a Building Permit application shall be filed within ~~18~~ **24** months of Special Use Permit approval**, unless an extension is granted by the Hearing Examiner after an open record hearing and an opportunity to consider any new information presented.**.

3. The antenna support structure shall be the minimum height necessary to provide service to the three carriers. Tower width shall be reduced accordingly. Space for a fourth co-locator shall be eliminated to reduce tower width and height.

4. Permits for the equipment building and the antenna support structure shall not be issued independently.

5. The proposed tank and emergency generator location shall be approved by the City of Bellevue Fire Marshal as well as the Town of Hunts Point, prior to issuance of a Building Permit.

6. Exterior lighting shall be prohibited.

7. A lease agreement with the Town of Hunts Point shall be executed prior to submittal of any applications for construction of the facilities.

Initially decided on the 16th day of September 2010.

Revised this 16th day of March 2012.

THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center

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Network Engineering

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SEA Hunts Point RF Justification

Overview:

The wireless signal coverage for Highway 520, Evergreen Point, Hunts Point, and Yarrow Point is currently being provided by Verizon's existing SEA Fairweather site. Because of the Highway 520 Expansion Project, Verizon is required to remove the SEA Fairweather site that provides existing signal coverage. With the loss of the Fairweather site, the proposed SEA Hunts Point site is a replacement site to provide wireless signal coverage to approximately the same stretch of highway 520, Hunts Point, Evergreen Point, and Yarrow Point.

Coverage:

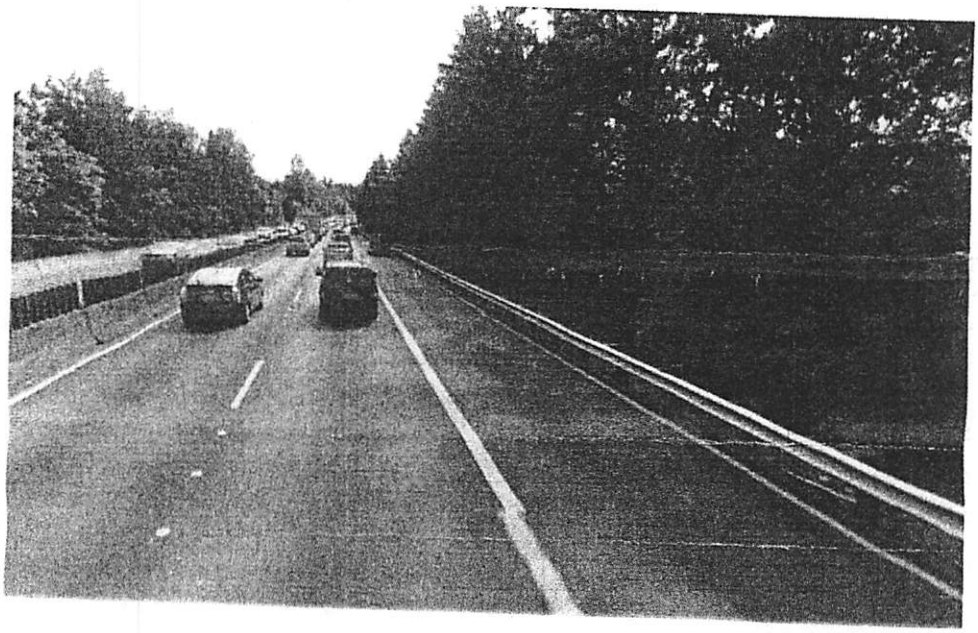
The intended coverage area of SEA Hunts Point has difficult terrain challenges that can block and attenuate the wireless signal. The proposed collocation on the existing telecom pole at Hunts Point Park sits on relatively low ground. The elevation and terrain rises to the west towards the 520 Bridge, rises to the south towards Medina, rise quickly to the east along Highway 520 eastbound. There is approximately a 120 feet change in elevation between various locations within the intended coverage area.

The terrain for Hunts Point itself rises northbound along Hunts Point Road to about midway between NE 32nd Street and the Northern tip of Hunts Point. After the midway point, the land drops from the high point of Hunts Point to the lower terrain at the northern tip of Hunts Point. The terrain of Hunts Point also climbs from the western Fairweather Bay side of Hunts Point up to the peak on Hunts Point Road before descending on the eastern side towards the waters. In Hunts Point, there is approximately a 50 feet change in elevation. These dramatic changes in elevation causes blockage and attenuation difficulties for wireless coverage signals and can only be overcome by positioning the antennas at a suitable height.

EX. 16

The intended coverage area also has many tall evergreen and deciduous trees which can be quite densely grown in the neighborhood areas, along Highway 520 and arterial routes. Along Highway 520, Fairweather Park, Hunts Point Park, and the larger forested areas North of Hwy 520 and East of Hunts Point Lane contain densely grown and tall evergreen and deciduous trees. The trees in the area typically are between 40 to 70 feet tall. The trees and foliage severely attenuate and reduce the wireless signal. Wireless signals that propagate through the heavy foliage of evergreen and deciduous trees are quickly attenuated and the signal loses strength rapidly. The method to overcome severe foliage signal attenuation is to place the antenna above the tree lines such that the antennas have a good vantage point to the homes and vehicles. The figure labeled Typical Foliage of Area shows the trees that are typical of the area along Highway 520.

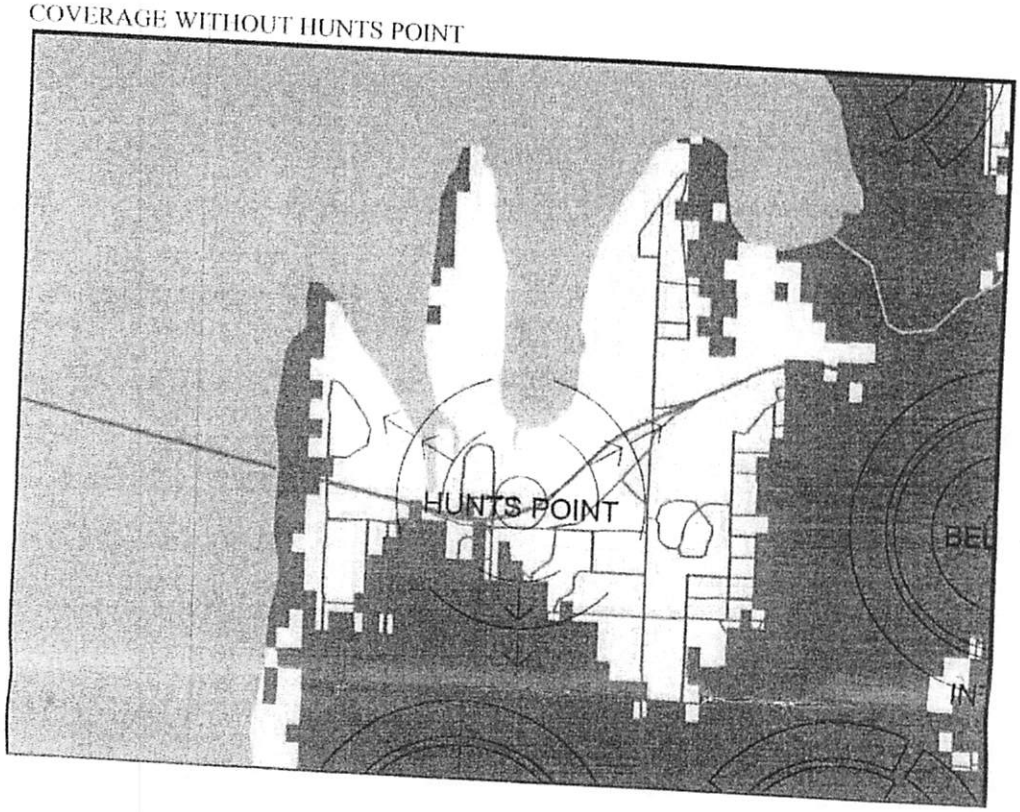
TYPICAL FOLIAGE OF AREA



Because of the terrain and tree foliage challenges of this area from a wireless signal coverage perspective, the minimum required centerline for the antennas is 70 feet Above Ground level at the proposed collocation site at the Hunts Point Park. Antenna heights lower than this will result in the signal being blocked and attenuation and consequently not meet the coverage objectives.

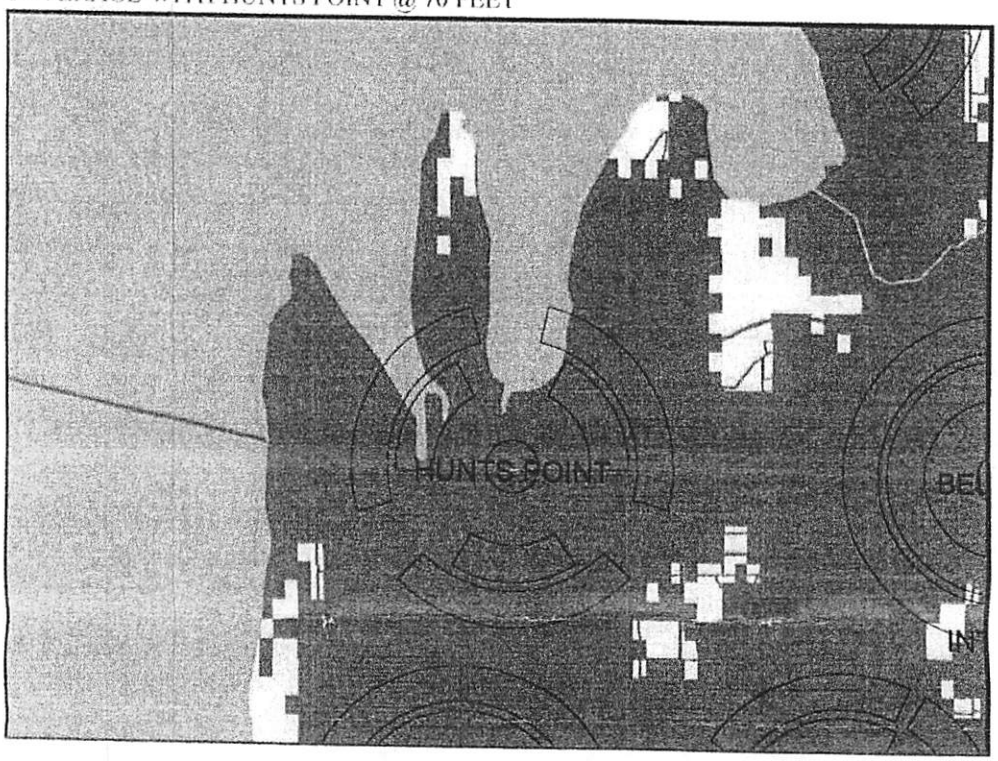
The wireless signal coverage plot below, labeled Coverage Without Hunts Point represents the predicted coverage without the proposed site. The green color represents in-building coverage and the yellow represents in-vehicle coverage. The color white or areas not green or yellow represents insufficient received wireless signal.

COVERAGE WITHOUT HUNTS POINT



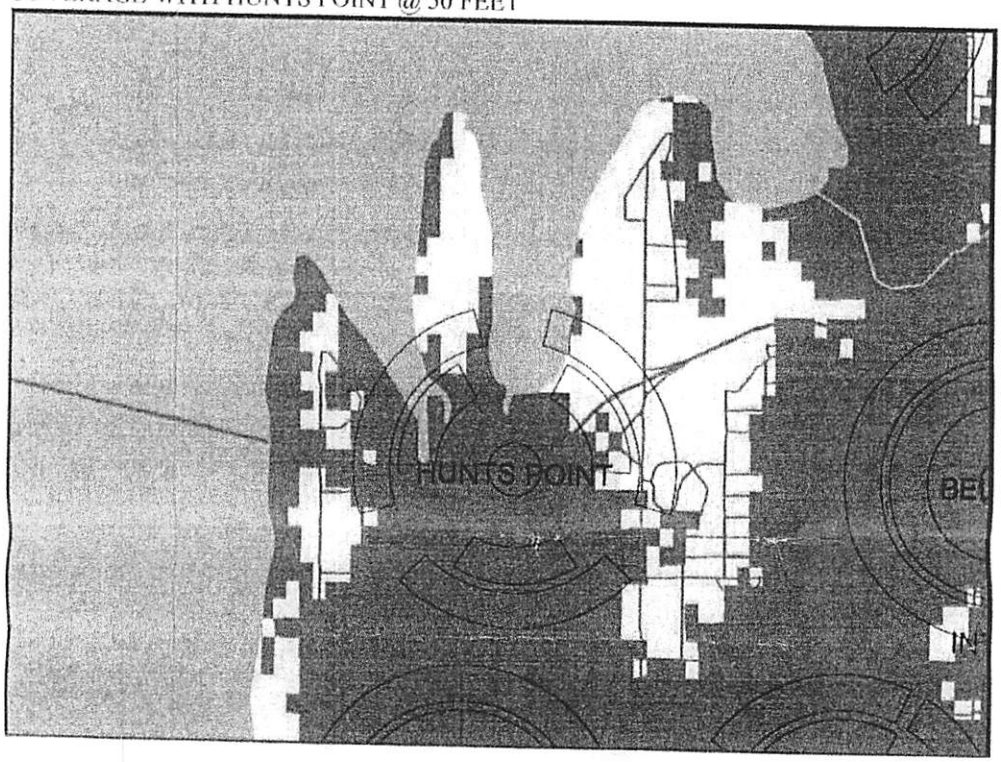
The wireless signal coverage plot below labeled Coverage with Hunts Point @ 70 feet represents the predicted coverage with the proposed collocation site. This height is the minimum antenna height for the coverage signal to overcome the terrain and foliage challenges. The green color represents in-building coverage and the yellow represents in-vehicle coverage. The color white or areas not green or yellow represents insufficient received wireless signal.

COVERAGE WITH HUNTS POINT @ 70 FEET



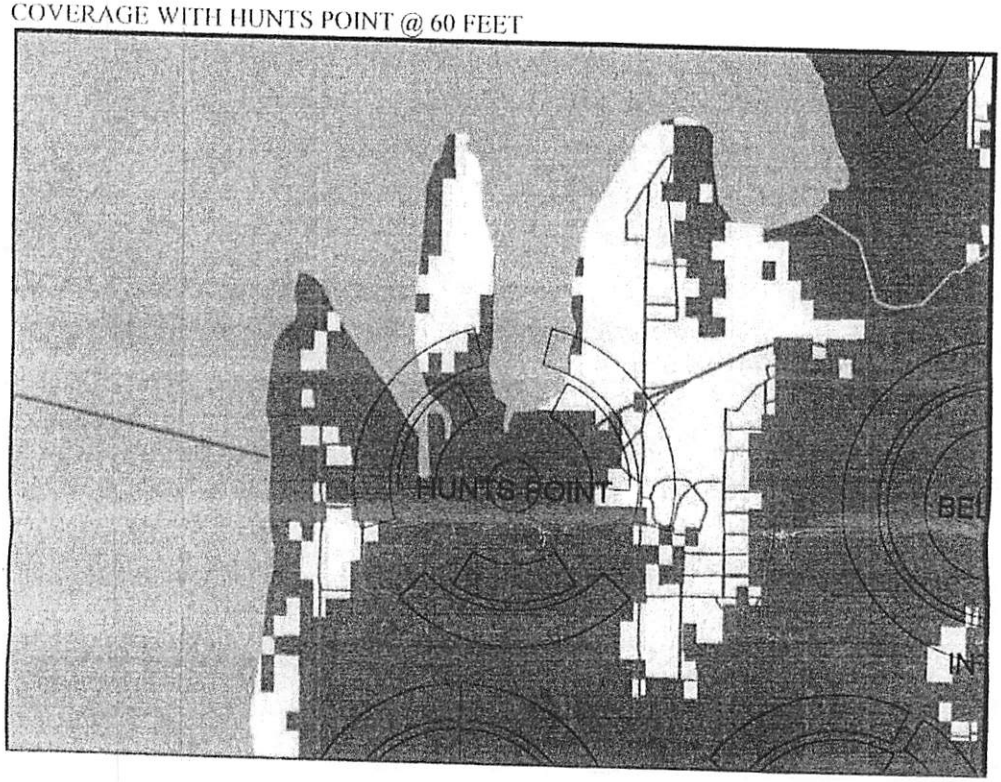
The wireless signal coverage plot below labeled Coverage with Hunts Point @ 50 feet represents the predicted coverage with the proposed collocation site. This height is too low for the antenna and the coverage signal to overcome the terrain and foliage challenge. Significant areas on Hunts Point, Yarrow Point, and Highway 900 do not have sufficient signal strength. The signal reach is largely reduced because the antenna is below the tree line and the signal thus needs to travel through the trees. The green color represents in-building coverage and the yellow represents in-vehicle coverage. The color white or areas not green or yellow represents insufficient received wireless signal.

COVERAGE WITH HUNTS POINT @ 50 FEET



The wireless signal coverage plot below labeled Coverage with Hunts Point @ 60 feet represents the predicted coverage with the proposed collocation site. This height is also too low for the antenna and the coverage signal to overcome the terrain and foliage challenge. The green color represents in-building coverage and the yellow represents in-vehicle coverage. The color white or areas not green or yellow represents insufficient received wireless signal.

COVERAGE WITH HUNTS POINT @ 60 FEET



Summary:

In summary, the proposed SEA Hunts Point collocation site at 70 feet antenna height is required to meet the coverage objective and be a suitable replacement for the Fairweather site which is being removed because of the highway expansion project.

17 MAY 2010

Lap Tse
RF Engineer
Verizon Wireless