OFFICE OF THE HEARING EXAMINER KING COUNTY, WASHINGTON

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ORDER ON MOTION

SUBJECT: Department of Local Services file no. CDUP200002

AT&T SAMMAMISH BEAVER LAKE

Conditional Use Permit Appeal

Location:	26325 SE 39th Street, Issaquah
Applicant:	Smartlink LLC (AT&T) represented by Richard Busch Busch Law Firm PLLC 1420 NW Gilman Blvd #9014 Issaquah, WA 98027 Telephone: (206) 265-3821 Email: rich.busch@wirelesscounsel.com
Appellant:	SBA Communications Corp. represented by Patrick Mullaney Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101 Telephone: (206) 624-0900 Email: patrick.mullaney@stoel.com
King County:	Department of Local Services represented by Nancy Goree Department of Local Services 35030 SE Douglas Street Suite 210 Snoqualmie, WA 98065 Telephone: (206) 477-0331 Email: nancy.hopkins@kingcounty.gov

Overview

The Department of Local Services (Local Services) approved a permit to allow AT&T¹ to construct a cell tower. Owners of a rival cell tower, SBA Communications Corp. (SBA), appealed the permit, asserting that SBA's tower had the capacity to accommodate AT&T's equipment and that Local Services misapplied the standards for when an applicant has to colocate facilities on an existing tower. Because the code limits the colocation inquiry to other sites within 0.25 miles of the proposed project, and SBA's tower is 0.69 miles from the project site, we grant AT&T's motion to dismiss SBA's appeal.

Background

- 2. On January 31, 2020, AT&T applied to construct a cell tower in unincorporated King County. As the proposed tower was over 60 feet, it required a conditional use permit ("Permit").
- 3. On December 17, 2021, Local Services issued a Determination of Non-Significance (DNS) under the State Environmental Policy Act (SEPA). The DNS stated that the threshold determination had to be appealed on or before January 12, 2022. No one appealed the DNS.
- 4. Also on December 17, 2021, Local Services issued the Permit itself. The Permit stated that it too had to be appealed on or before January 12, 2022. On January 11, SBA timely appealed the Permit, explaining:

Please consider this letter as SBA's formal appeal of King County, WA's (the County) decision to approve SmartLink, LLC's ("SmartLink" or "Applicant") Conditional Use Permit to allow construction of a new 150-foot tall wireless telecommunication tower at 26325 SE 39th Street, Issaquah, WA 98029 ("the Proposed Tower") (a copy of the Notice Decision and SEPA Threshold Determination is enclosed).

- 5. SBA's appeal was that, in the face of SBA's existing cell tower which SBA asserts could accomdate AT&T's coverage needs, the Permit violated the County code provisions favoring cell tower colocation.
- 6. We held a prehearing conference on February 2. SBA sought leave to amend its appeal statement. Over AT&T's objection, we allowed an amendment. SBA did not request leave to appeal the DNS.
- 7. Also at conference, AT&T indicated its desire to file a motion to dismiss SBA's appeal on grounds that the colocation requirements only apply to potential locations within a 0.25 mile radius. (SBA's tower is 0.69 miles from project site, and SBA has not identified any potential colocation sites within a 0.25 mile radius of the project site.) We set a

¹ In different documents, the applicant is listed as: Smartlink, LLC; New Cingular Wireless PCS, LLC; and AT&T. We use the shortest name.

schedule for SBA to file an amended appeal statement on the colocation issue, followed by AT&T's motion to dismiss, SBA's opposition, and AT&T's reply.

AT&T's Motion to Strike

- 8. In addition to filing a motion to dismiss SBA's appeal, AT&T filed a motion to strike two portions of SBA's amended appeal.
- 9. AT&T asserts that SBA improperly expanded its appeal of the Permit beyond the colocation issue. Some of SBA's points in its amended appeal (and in its later brief in opposition to AT&T's motion to dismiss), such as the policy citing facilities serving rural residents, are not pertinent to colocation and today's analysis.² But that is more a *weight*, not an admissibility, issue. We do not strike any of portions of SBA's filings related to the Permit.
- 10. However, SBA belatedly raising SEPA and attempting to challenge the DNS is another story entirely. As noted above, SBA appealed the Permit. SBA did not appeal the DNS. SBA alleged errors related to two provisions of the code, but it did not reference any alleged SEPA shortcomings. And then SBA failed to mention SEPA at our conference.
- 11. Even if SBA had requested leave to add a SEPA component to its amendment, we would have denied that request. SBA—and anyone else—had until January 12 to appeal the DNS. SBA elected not to appeal the DNS; no one else appealed the DNS either. Thus, by January 13, the DNS became final and unreviewable. We have no jurisdiction to now entertain a SEPA-related challenge. We strike those portions of SBA's amended appeal, and of its brief in opposition to AT&T's motion to dismiss, raising SEPA issues.

<u>Analysis</u>

12. The County has two Comprehensive Plan policies discouraging single-use cell tower proliferation and encouraging colocation.

F-349 Co-location of telecommunication facilities is encouraged to reduce the unnecessary proliferation of individual, single-user towers. Co-location shall be required unless an applicant can demonstrate to the satisfaction of the county that collocation on an existing tower is not feasible and not consistent with service quality and access.

F-350 Although visual impacts are always an important consideration in the decision to approve or deny a proposal, King County shall give greater weight to the visual impacts of telecommunication facilities proposed to be located on residentially-zoned lands or in the Rural Area or Natural

² Comprehensive Plan policy R-326(c) discusses facilities and services serving rural residents. It is not even located in the Telecommunications section of the Plan (policies F-345 through F-351). It has little or nothing to say about colocation of cell towers, and absolutely zero to add on the scope of the colocation inquiry.

Resource Lands. In addition, the visual impacts of proposals for an individual tower with a single user shall be given greater weight than proposals to collocate facilities.

- 13. To implement these colocation policies, the County adopted KCC 21A.27.080, which states:
 - A. Upon application for a conditional use permit or a building permit for a new free-standing tower, whichever is required first, the applicant shall provide a map showing all existing transmission support structures or other suitable nonresidential structures located within one-quarter mile of the proposed structure with consideration given to engineering and structural requirements. No new transmission support structure shall be permitted if an existing structure suitable for attachment of an antenna or collocation [colocation] is located within one-quarter mile, unless the applicant demonstrates that the existing structure or a new structure complying with K.C.C. 21A.27.090:
 - would be physically or technologically unfeasible pursuant to K.C.C. 21A.27.130, or
 - 2. is not made available for sale or lease by the owner, or
 - 3. is not made available at a market rate cost, or
 - 4. would result in conflicts with Federal Aviation Administration height limitations.
 - B. The burden of proof shall be on the applicant to show that a suitable existing, modified or replacement structure for mounting of antenna or collocation [colocation] cannot be reasonably or economically used in accordance with these criteria.
 - •••
- 14. The first sentence of A.—requiring a conditional use permit application to show existing structures, but only within 0.25 miles—is strong evidence that the colocation requirements only extend to pre-existing structures within that 0.25 mile radius. Where a stated area is potentially only a *starting* point, the County knows how to phrase the limit in more expensive terms and to indicate that eventual review may be broader. For example, to choose another 0.25-mile criteria, this one from the drainage context, an applicant's "initial permit submittal shall include, at minimum" a downstream analysis of a 0.25-mile stretch; however, the text clarifies that drainage review should look "beyond that, as needed," and it explicitly requires an expanded analysis if drainage problems in the initial area are uncovered.³ Nothing in KCC 21A.27.080.A's first sentence indicates the colocation review could potentially expand beyond 0.25 miles. And it would be bizarre if Local Services could make a reversible error by not analyzing potential colocation sites beyond the area the applicant was supposed to submit information on.

³ 2016 King County Surface Water Design Manual 1.2.1.

Yet, standing alone, the first sentence might not have been the final word on the scope of Local Services' colocation inquiry.

- 15. The second sentence in A. nails this shut. The decision criteria Local Services is to apply in evaluating colocation is limited to existing structures within a 0.25-mile radius. *Period.*
- 16. And if there were any lingering doubt coming out of subsection A. (which there is not), subsection B. obliterates it, explaining that the applicant must prove that other towers "cannot be reasonably or economically used *in accordance with these criteria.*" KCC 21A.27.080.A sets for the criteria an applicant must meet to show conformance with the County's colocation requirements. There is not some other, broader standard Local Services (or we) can gin up.
- 17. Nor does anything in the Comprehensive Plan alter that analysis. To be sure, a conditional use permit may not conflict with Comprehensive Plan policies. KCC 21A.44.040.H. As replicated above, policies F-349 and F-350 encourage colocation to reduce unnecessary tower proliferation of individual, single-user towers and require colocation unless an applicant demonstrates collocation on an existing tower is not workable. Neither says anything about how far afield the inquiry should look. And in translating these policies into specific code criteria, the drafters of KCC 21A.27.080 determined, in their ultimate wisdom, that 0.25 miles was the potential colocation area to examine and within which to avoid proliferation.
- 18. Even if Local Services (or we) thinks a broader area would better effectuate Comprehensive Plan policies, Local Services (or we) has no authority to essentially rewrite KCC 21A.27.080 to more robustly curb tower proliferation by expanding the colocation area beyond the 0.25 miles defined not once, but twice in the decisional criteria. "When presented with such clear language, we must assume the Legislature meant exactly what it said and apply the statute as written." University of Washington v. City of Seattle, 188 Wn. 2d 823, 832, 399 P.3d 519 (2017) (citations omitted).
- 19. Similarly, SBA cites KCC 21A.26.010, which explains that the goals of KCC Title 21A chapter 26 include "A. Encourage the location of towers in nonresidential areas and minimize the total number of towers throughout the community," and "B. Strongly encourage the joint use of new and existing tower sites." Assuming those purposes carry over to KCC Title 21A chapter 27, it does not change the outcome. When the drafters determined how to translate those purposes into decisional criteria, they crafted KCC 21A.27.080 to sets 0.25 miles as the relevant area. We can think of different ways that KCC 21A.27.080 could be written to perhaps better advance KCC 21A.26.010's purposes and combat tower proliferation, but our role today is not to re-write the code, only to apply it.
- 20. The only piece the gives us pause comes, ironically, from AT&T's reply brief. In the Permit, Local Services discussed AT&T identifying and evaluating a possible alternative site near the proposed facility. When we read that, we were unsure whether the discussion referred to SBA's tower or to a tower within 0.25 miles. In its reply, AT&T confirmed that SBA's tower was the one being discussed in the Permit. That actually cuts

against AT&T's argument, illustrating that, during this permit process, AT&T believed it had to identify and analyze sites outside the 0.25-mile radius, and that Local Services believed it should or at least could review the colocation feasibility of sites beyond the 0.25-mile radius.

- 21. However, we do not grant substantial weight or otherwise accord deference to agency determinations. Exam. R. XV.F.3. That is especially true in the land use context; because courts give substantial deference not only to an examiner's factual determinations but also to the examiner's legal determinations, an examiner deferring to an agency interpretation would essentially be passing the deference buck. See Durland v. San Juan County, 174 Wn. App. 1, 12, 298 P.3d 757 (2012). Regardless of how Local Services interpreted KCC 21A.27.080's colocation requirements, the text is abundantly clear that 0.25 miles is currently the cut-off on the colocation inquiry. Local Services (nor we) get to "add words where the legislature has chosen not to include them." Nelson v. Department of Labor & Industries, 198 Wn. App. 101, 110, 392 P.3d 1138 (2017).
- 22. Coming at this the other way, suppose Local Services had undertaken its review and found that, while AT&T had proved that no existing facilities within 0.25 miles met the listed criteria (a fact no one challenges), AT&T had <u>not</u> proved this with respect to SBA's tower 0.69 miles away. And further suppose that Local Services had denied AT&T's application solely on that basis. If AT&T had appealed that denial, then—at least based on the arguments presented in today's case—we would have granted AT&T's appeal. In that scenario, AT&T's application would have met the code's colocation decision criteria, and yet Local Services would have been improperly adding a hurdle beyond what the code explicitly states. The way the current code is written, the existence of cell towers 0.26 miles and beyond, such as SBA's tower located 0.69 miles away, would not have been a legitimate ground to deny AT&T's application. And it is not a legitimate ground on which we could grant SBA's appeal either.
- 23. The 0.25-mile radius limitation may be good or bad policy. If the Council or Local Services believes that the colocation and anti-proliferation policies of the Comprehensive Plan would be better served by casting a wider net, requiring applicants to scope out a broader swath of territory, allowing Local Services to analyze a more robust area, and authorizing Local Services to deny an application based on existing cell towers across a greater expanse, then Godspeed re-writing the code. In fact, in our annual reports we must identify for Council any potential clarification of county policy or development regulations. KCC 20.22.310. We intend to put this issue on Council's radar screen in our next annual report, to see if they would like to revisit the issue.
- 24. But that is all future-looking. For today's appeal, our role is to interpret the codes "as they are written, and not as we would like them to be written." *Brown v. State*, 155 Wn.2d 254, 268 (2005) (citations omitted). And the current code limits the colocation analysis to other sites within a 0.25-mile radius. SBA's existing tower is well over double that distance, and SBA did not identify any existing structures with a 0.25-mile radius that Local Services allegedly missed.

Conclusion

25. Because SBA's appeal does not constitute a legally adequate basis to challenge the Permit, we GRANT AT&T's motion, DISMISS SBA's appeal, and CANCEL the hearing tentatively scheduled for May 20, 2022.

DATED April 8, 2022.

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David Spohr Hearing Examiner

NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County's final decision for this type of case. This decision shall be final and conclusive unless proceedings for review of the decision are timely and properly commenced in superior court. Appeals are governed by the Land Use Petition Act, Chapter 36.70C RCW.

April 8, 2022

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. CDUP200002

AT&T SAMMAMISH BEAVER LAKE

Conditional Use Permit Appeal

I, Jessica Oscoy, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **ORDER ON MOTION** to those listed on the attached page as follows:

EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

Description of the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED April 8, 2022.

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Jessica Oscoy Office Manager Allen, Kim Smartlink LLC (AT&T)

Bullinger, John Stoel Rives LLP

Busch, Richard Busch Law Firm PLLC

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