CITY OF SPOKANE HEARING EXAMINER

Re:	Conditional Use Permit Application by T-Mobile & Parallel Infrastructure to allow the construction of a wireless communication tower at 9001 N. Indian Trail Road	FINDINGS, CONCLUSIONS, AND DECISION FILE NO. Z150023-CEL3

SUMMARY OF PROPOSAL AND DECISION

Proposal: T-Mobile and Parallel Infrastructure (collectively "T-Mobile") seek a conditional use permit in order to allow the construction of a 70' monopole wireless communication tower together with accessory ground support equipment within a fenced and landscaped area in a center and corridor zone located at 9001 N. Indian Trail Road, Spokane, Washington.

Decision: Denial of conditional use permit.

FINDINGS OF FACT
BACKGROUND INFORMATION

Applicant: T-Mobile & Parallel Infrastructure
617 8th Ave. South
Seattle, WA 98104

Agent: Tom Johnson
c/o Lexcom Development Corporation
1711 12th Ave., Ste. 410
Seattle, WA 98122

Owner: Sundance Plaza, LLC
12906 Addison Street
Spokane, WA 99208

Property Location: 9001 N. Indian Trail Road, Spokane, WA, 99208. The tax parcel of the property is 26225.0153.

Legal Description: The legal description of the property is provided in Exhibit 2F.

Zoning: The property is zoned CC2-NC (Center and Corridor 2 – Neighborhood Center).

Comprehensive Plan Map Designation: The property is designated as Center and Corridor in the city's Comprehensive Plan.

Site Description: The site is an irregular-shaped parcel located at the intersection of Barnes Avenue and Indian Trail Road. The topography of the site is relatively flat. The site is improved as a shopping center with associated parking. The property is approximately 12.57 acres in size.

Surrounding Uses: The land to the south is zoned CC2-NC. The land to the west and north is zoned RMF (Residential Multi Family). The land to the east is zoned O-35 (Office with a 35-foot height limitation).

Project Description: The applicant has requested a Type III conditional use permit for the construction of a 70' monopole wireless communication tower along with associated ground equipment. If approved, the tower and associated ground equipment will be constructed within an area approximately 46 feet by 54 feet. The ground equipment and a portion of the tower will be shielded on two sides by the existing building. A fence will be constructed on the other two sides, enclosing the area in which the tower and ground equipment will be installed. A row of trees will be planted on a portion of the western boundary of the property to provide additional screening.

PROCEDURAL INFORMATION

Authorizing Ordinances: Spokane Municipal Code ("SMC") 17C.355, Wireless Communication Facilities; SMC 17C.320.080, Conditional Use Criteria; and SMC 17G.060.170, Decision Criteria.

Notice of Community Meeting: Mailed: February 19, 2015
Posted: February 19, 2015

Notice of Application/Public Hearing: Mailed: June 8, 2015
Posted: June 8, 2015

Community Meeting: March 10, 2015

Public Hearing Date: July 9, 2015

Site Visit: July 8, 2015

SEPA: A Determination of Nonsignificance ("DNS") was issued by the City of Spokane on June 24, 2015.

Testimony:

Dave Compton, City Planner
City of Spokane Planning & Development
808 West Spokane Falls Boulevard
Spokane, WA 99201

Tom Johnson
c/o Lexcom Development
1711 12th Ave., Ste. 410
Seattle, WA 98122

Exhibits: Z1500023 CEL3

1. Planning Services Staff Report
2. Application, including:
   - 2A General application
   - 2B Conditional Use Permit application
   - 2C Wireless Communication Facility affidavit
   - 2D Land Use Standards Wireless Communication Facilities
   - 2E Notification Map application
   - 2F Coversheet and Overall Site Plans
   - 2G Landscape plans, with comments
   - 2H Illustrations of existing and proposed cell tower
   - 2 I Existing Tower Proximity Report from Proposed Site Location
   - 2J Osprey Excluder information
   - 2K Transmit frequencies
   - 2L Zoning map
   - 2M Geographic Coordinates
   - 2N Ground Lease Agreement
   - 2O Location of Access Easement "A"
   - 2P Legal description
   - 2Q Coverage Predictions for SP01263C – Assumption
   - 2R Determination of No Hazard to Air Navigation
   - 2S Registration 1295559
3. Conditional Use Permit Counter Complete checklist
4. Engineering Services comments
5. Wastewater Management comments
6. Spokane Tribe of Indians comments
7. Notice map
8. Parcel listing
9. Address listing with copies of non-deliverable notice envelopes
10. Notice of community meeting
11. Combined notice of application and public hearing
12. Affidavit of mailings
    - 12A community meeting dated 02-19-15
    - 12B combined application/public hearing dated 06-08-15
13. Affidavit of public notice
    - 13A community meeting dated 02-19-15
    - 13B combined application/ public hearing dated 06-08-15
14. Affidavit of Sign Removal, community meeting dated 03-11-15
15. SEPA Determination of Nonsignificance
16. Environmental Checklist
17. Community Meeting sign in sheet
18. Community Meeting notes
19. Email dated 09-18-14 to Scott Chesney/David Compton from Tom Johnson re: application process
20. Emails dated 09-19-14 thru 02-11-15 to/from Tom Johnson and Dave Compton re: permit fees and processes
21. Letter dated 01-23-15 to Dave Compton from T. Johnson re: notification map application
22. Letter dated 02-12-15 to Tom Johnson from Dave Compton

re: community meeting instructions

23. Email dated 02-18-15 to Dave Compton from Tom Johnson
re: participating in neighborhood meeting
24. Emails dated 03-10-15 to/from Tom Johnson and Dave Compton
re: documentation on moratorium on cell towers
25. Letter dated 03-11-15 to Dave Compton from Tom Johnson
re: submittal of application and documents
26. Letter dated 03-12-15 to Interested Parties from Dave Compton
re: requesting comments
27. Emails dated 03-11/17-15 to/from Tom Johnson and Dave Compton
re: project clarification
28. Letter dated 04-01-15 to Tom Johnson from Dave Compton
re: technically incomplete
29. Emails dated 04-02/03-15 to/from Tom Johnson and Dave Compton
re: comments on conditions
30. Emails dated 04-02/15-15 to/from Tom Johnson and Dave Compton
re: comments on conditions
31. Emails dated 04-02/17-15 to/from Tom Johnson and Dave Compton
re: screening requirements
32. Letter dated 06-02-15 to Tom Johnson from Dave Compton
re: combined notice of application/public hearing instructions
33. Emails dated 06-05/08-15 to/from Tom Johnson and Dave Compton
re: notification of hearing
34. Public Comments
    - 34A Email dated 03-13-15 from Michael Vergie in favor of project
    - 34B Email dated 03-14-15 from Judi Holden no problem with cell tower
    - 34C Email dated 03-13-15 from Robert Bell Indian Trail cell tower on hold
    - 34D Email dated 05-06-15 from Michael Vergine status of project

A Exhibits received at hearing
- A-1 Planning Services' PowerPoint presentation

FINDINGS AND CONCLUSIONS

To be approved, the proposed conditional use permit must comply with the criteria set forth in Spokane Municipal Code sections 17G.060.170 and 17C.320.080. After considering the matter in detail, the Hearing Examiner concludes that the CUP application cannot be approved because the use is not allowed under the provisions of the land use code. As a result, the CUP application must be denied.

1. *The proposal is not expressly allowed under the provisions of the land use codes. See SMC 17G.060.170(C)(1).*

The applicant has proposed to construct a Wireless Communication Facility on property which is zoned CC2-NC (Center and Corridor 2 – Neighborhood Center). Whether this use is authorized by the land use codes should be determined either by: (1) the code provisions governing the CC2 zoning category; or (2) the code sections specific to Wireless Communication Facilities.

According to SMC 17C.122.070, the uses allowed in the Center and Corridor zones are shown in Table 17C.122-1. Notably, the table makes no reference to the proposed use, i.e. Wireless Communication Facilities. This suggests that such facilities are not authorized in the CC zones. *See* Table 17C.122-1. However, that is not the end of the inquiry. The code sections which specifically govern Wireless Communication Facilities must also be examined. *See* SMC 17C.355.010 *et seq*. Under those code sections, Wireless Communications Facilities may be constructed in a range of zones, including R, O, OR, NR, NMU, CB, and GC. *See* 17C.355.030(A)-(B). However, there is no reference at all to Center and Corridor zones, again leaving the impression that Wireless Communication Facilities are not allowed in the Center and Corridor zones.

The Hearing Examiner concludes that there is no direct authority for the construction of a Wireless Communication Facility in a CC zone. The Planning Department concedes as much in its Staff Report. Given this reality, the proposed use can only be approved if some other (essentially indirect) source of authority for the use can be found in the municipal code. The Planning Department believes it found that authority within the terms of SCM 17C.190.030(B). The Hearing Examiner disagrees.

2. *The provisions of SMC 17C.190.030(B) do not create independent authority for the proposed use, despite the Planning Department's arguments to the contrary.*

Despite the apparent absence of direct authority, the Planning Department contended that a Wireless Communication Facility should be approved at the proposed location by a Type III conditional use permit. The basis for this contention was the Planning Department's interpretation of SMC 17C.190.030(B). The Planning Department explained its position this way:

> At the present time, Center and Corridor zones are not listed in the body or either matrix table within the Wireless Communication Facilities code section. In accordance with SMC section 17C.190.030 Classification of Uses; (B) – Uses Not Listed, if a use is not listed, the planning director may determine that a proposed use is substantially similar to other uses

permitted or not permitted in the respective zones, and therefore should also be permitted or not permitted. In this case, it has been determined that a Center and Corridor zone is most closely related to the NR (Neighborhood Retail) zone as was the previous zoning category of B2-L. Referencing the following attachments from the previous code, a 70-foot tower could have been erected in a B2 zone with a Special Permit from the Planning Director or could have been between 71-90 feet high in that zone with a Special Permit from the Hearing Examiner.

See Exhibit 1, pp. 5-6. At the hearing, the Planning Department further explained that the authorization for cell towers was inadvertently omitted when the zoning categories were changed in the early to mid-2000s. *Testimony of D. Compton.* The Planning Department also noted that the Wireless Communication Facilities code is being rewritten to address this omission, but that code revision has not yet been completed. *See id.* While there may be many reasons why a the proposed cell tower *should* be allowed in a CC2 zone, the Hearing Examiner concludes that such use is not actually authorized in that zone. Although the Hearing Examiner is sympathetic to the arguments presented, the Hearing Examiner nonetheless feels compelled to conclude that a cellular tower is not permitted in a CC2 zone, for the reasons discussed below.

a) *SMC 17C.190.030(B) does not apply to this case because the proposed use is specifically defined and regulated under the municipal code. The gap-filling function of that provision has no application to this case.*

As a threshold matter, the Hearing Examiner concludes that SMC 17C.190.030(B) does not apply to this case. SMC 17C.190.030(B) is intended to help resolve situations in which the zone code does not explicitly state whether a use is permitted or not. Here, it is not appropriate to rely upon the gap-filling discretion created by SMC 17C.190.030(B), because the municipal code contains specific provisions that govern Wireless Communication Facilities. *See* SMC 17C.355.010 *et seq.* T-Mobile did not propose a use that the legislators failed to contemplate. On the contrary, SMC 17C.355 specifically addresses when and where Wireless Communication Facilities may be constructed. The fact that SMC 17C.355 does not authorize Wireless Communication Facilities in Centers and Corridors must be interpreted as an intentional choice. If, however, the omission of cell towers from CC zones was truly a mistake, the error will have to be corrected by the legislature. The Hearing Examiner does not have authority to re-write the code to correct the alleged oversight.

b) *SMC 17C.190.030(B) allows the Planning Director to decide whether a "unlisted" use is allowed as analogous to other uses expressly allowed in applicable zone; it does not authorize a use through the application of a different zoning category.*

Pursuant to SMC 17C.190.030(B), when a use is proposed which is not explicitly allowed or disallowed by the zoning code, the Planning Director is granted the discretion to determine whether the use is permitted or not. The Planning Director is supposed to make that decision by comparing the unlisted use to the uses which are explicitly addressed in the zone code. If the unlisted use is most similar to an allowed use, then the unlisted use may be permitted. If the unlisted use is most analogous to disallowed uses, then the unlisted use should not be permitted. In this way, proposed uses are allowed or disallowed in a way that is both fair to the applicant and consistent with the intent of the zoning that applies to a particular property.

The Planning Department did not apply SMC 17C.190.030(B) in this fashion. Rather, the Planning Department reasoned that because the Wireless Communication Facilities code section does not list the CC2 zone among the zones in which a cell tower is permitted, SMC 17C.190.030(B) authorized the Planning Department to look to other zoning categories for authority for the proposed use. This approach is not consistent with the language of the code. Wireless Communication Facilities are not an unlisted *use*, at least not in the provision being interpreted by the Planning Department. SMC 17C.355 specifically addresses when and where Wireless Communication Facilities are allowed. SCM 17C.355 did not fail to list the proposed *use*; it omitted the CC2 *zoning category*. There is a difference between a *use* and a *zoning category*. In the Hearing Examiner's view, SMC 17C.190.030(B) allows the Planning Director to fill a gap when a *use* is not listed *within* a zoning category; it does not grant the Planning Director discretion to apply an entirely different zoning category to a property.

SMC 17C.190.030(B) only allows the Planning Director to compare an unlisted use to uses identified "in the respective zones." The phrase "in the respective zones" does not mean that the Planning Director may consider uses across all zoning categories, in order to determine whether the use is allowed in one specific classification. Rather, it means that that the Planning Director should consider the list of uses allowed or disallowed in the zoning classification that applies to the subject property, and then classify the unlisted use accordingly. The Planning Department followed a different course. As a result, the Hearing Examiner concludes that the Planning Department's methodology is inconsistent with the intent of SMC 17C.190.030(B).

c) *Even if SMC 17C.190.030(B) is used to interpret the provisions of the CC2 zone, the proposed cellular tower should not be approved.*

Assuming *arguendo* that SMC 17C.190.030(B) should be considered, applying that provision to this case is problematic. With one possible exception discussed below, the uses listed as allowed/disallowed in the CC2 zone bear no similarity to Wireless Communication Facilities. The Planning Department did not draw any comparisons between the uses listed on Table 17C.122-1 and the proposed cell tower, and thus did not provide the Hearing Examiner with any guidance in that regard. If there aren't obvious parallels to draw between the proposed use and those listed, it is difficult to see how the Planning Director could properly exercise the discretion granted by the code.

The Hearing Examiner would note that there is one use listed on Table 17C.122-1 that might be considered analogous to a cellular tower, and that is a "utility structure." The phrase "utility structure" is not defined in the municipal code. However, the word "utilities" is defined and includes publicly or privately operated facilities. *See* SMC 17A.020.210(E) ("U" definitions). An example of a utility is telephone service, although land lines are likely contemplated. *See id.* Likewise, the word "structure" is defined and includes a tower. *See* SMC 17A.020.190 ("S" definitions). So, the term "utility structure" can be interpreted to include a privately operated tower for telephone service. That being said, there is little justification for relying upon SMC 17C.190.030(B) to divine the intent of the code when there is a specific provision explicitly governing the proposed use, i.e. SMC 17C.355. Moreover, "utility structure" is a rather generic term. Wireless Communication Facility, by contrast, is specifically defined to include any towers of other structures "intended for use in connection with transmission or receipt of radio or television signals, or any other spectrum-based transmissions/receptions." *See* SMC 17A.020.030(W) ("W" definitions). To the Hearing Examiner's understanding, this definition specifically contemplates the proposed use.

d) SMC 17C.190.030(B) does not authorize a cell tower in the CC2 zone based upon the similarities between the CC2 zone and the NR or B2 zones.

The Planning Department contends that a cell tower should be allowed in the CC2 zone because that use is allowed in analogous zones. Specifically, the Planning Department asserts that the CC2 zone is "most closely related" to the NR zone, which in turn is the successor to the B2 zoning category. The Planning Department noted that several years ago, the B2 zoning category was replaced by the NR zoning category. *Testimony of D. Compton.* The change from B2 to NR was characterized as essentially a "name change." *See id.* The Planning Department then cites the B2 zoning provisions to demonstrate that a 71-90 foot cell tower *could have been allowed*, with Hearing Examiner approval, *under the former code*. *See* Exhibit 1, pp. 5-6. So, it seems that the Hearing Examiner is being asked to approve the proposed facility because the CC2 zone is analogous to the B2 zone, which would have authorized the proposed use. This result is warranted, it is asserted, because the NR is "closely related" to the CC2, and the NR is essentially a new name for the B2 zone.

The Hearing Examiner is not convinced by the foregoing logic. As discussed in detail above, SMC 17C.190.030(B) contemplates a comparison between uses within a zoning category, not a comparison across various zoning categories. Even setting that aside, there is no legal basis for applying a *former* zone code to a current application, either directly or by analogy. SMC 17C.190.030(B) certainly does not go that far. To overcome this legal impediment, the Planning Department asserts that the difference between the B2 and NR zones is essentially in name only. However, if the change from B2 to NR was merely a "name change," there would be no reason to cite to the B2 code in the first place, except as historical background. In this case, the Planning Department seems to be citing to the B2 zoning provisions as a primary justification for the use.

In any event, there is at least one material difference between the NR and B2 categories, as applied to this case. In the B2 zone, a 71-90 foot tower could be approved by the Hearing Examiner. In the NR zone, the maximum height for a cell tower is 61-70 feet. *See* SMC 17C.355, Table A.2 (regarding Type III permits). The proposed tower is 70 feet in height, excluding the Osprey excluder. The excluder will add approximately 10 feet in height. *Testimony of T. Johnson.* Under the municipal code, tower height is measured from the base of the tower structure at grade to the highest point of the structure. *See* SMC 17A.020.200(J) (defining the term "Tower Height"). The completed tower, therefore, will have an actual height of 80 feet. A Type III conditional use permit (a "special use permit" under the former code) for an 80-foot tower could be approved in a B2 zone, but could not be approved in an NR zone. So, even if SMC 17C.190.030(B) allowed the Hearing Examiner to look to the NR zone code provisions to authorize the use, this proposal exceeds the height limits stated in the NR zone and could not be approved.

Ultimately, the Hearing Examiner could not approve the use based upon the B2 zone because that zone code has been repealed. The Hearing Examiner could not approve the use in an NR zone, because the proposal exceeds the height restriction of the NR zone. Regardless of these points, this discussion is rather academic. The property is zoned CC2, not NR or B2. The

proposed use is not authorized in a CC2 zone, and therefore the Hearing Examiner cannot approve the requested permit.

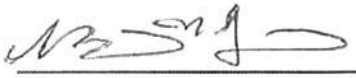
3. *Concluding Remarks.*

Nothing in this decision is intended as a criticism of the Planning Departments efforts in this case. The Planning Department went to great lengths to apply the code in a way that it believed was consistent with the city council's intent. The Planning Department contended that the failure to authorize cell towers in Centers and Corridors was an oversight which occurred in the process of creating and revising zoning categories. The Planning Department also emphasized that the placement of cell towers in the CC zones, which are commercial in nature, is consistent with the evolution of the code categories and current practices. The Hearing Examiner acknowledges that the Planning Department may be correct in these contentions. However, the Hearing Examiner finds the Planning Department's interpretation of the code cannot be reconciled with the language actually employed by the code. Whether a use is allowed or not should be an easy question to answer. Here, the Planning Department had to work extremely hard to find authority for the proposed use. That is because there are some troubling omissions from the code, which the city is apparently working to rectify. That being said, neither the Hearing Examiner nor the Planning Department can re-write the code under the guise of statutory interpretation. It is up to the city council to amend the code to authorize cellular towers in the CC zones, if that is the legislature's intent.

DECISION

Based on the findings and conclusions above, it is the decision of the Hearing Examiner to deny the proposed conditional use permit application of T-Mobile and Parallel Infrastructure.

DATED this 23rd day of July, 2015.



Brian T. McGinn
City of Spokane Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Appeals of decisions by the Hearing Examiner are governed by Spokane Municipal Code 17G.060.210 and 17G.050.

Decisions by the Hearing Examiner regarding conditional use permits are final. They may be appealed by any party of record by filing a Land Use Petition with the Superior Court of Spokane County. **THE LAND USE PETITION MUST BE FILED AND THE CITY OF SPOKANE MUST BE SERVED WITHIN TWENTY-ONE (21) CALENDAR DAYS OF THE DATE OF THE DECISION SET OUT ABOVE.** The date of this decision is the 23rd day of July 2015. **THE DATE OF THE LAST DAY TO APPEAL IS THE 13th DAY OF AUGUST 2015 AT 5:00 P.M.**

In addition to paying any Court costs to appeal the decision, the ordinance requires payment of a transcript fee to the City of Spokane to cover the costs of preparing a verbatim transcript and otherwise preparing a full record for the Court.

Pursuant to RCW 36.70B.130, affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.