



COUNTY COMMISSIONERS

John Hutchings  
District One  
Gary Edwards  
District Two  
Bud Blake  
District Three

**HEARING EXAMINER**

*Creating Solutions for Our Future*

**BEFORE THE HEARING EXAMINER  
FOR THURSTON COUNTY**

In the Matter of the Appeal of	)	APPL No. 18-106835 VE
	)	Project No. 2015103966
<b>Chris Nubbe and Alison Baker</b>	)	
<b>on behalf of</b>	)	<b>Verizon Wireless Vail Road</b>
<b>Deschutes Neighborhood Group</b>	)	<b>Wireless Communications Facility</b>
	)	<b>Special Use Permit</b>
of the May 3, 2018 SEPA Mitigated	)	
Determination of Non-Significance for the	)	
Verizon Wireless Vail Road WCF	)	
	)	
and	)	
	)	<b>FINDINGS, CONCLUSIONS, AND</b>
In the Matter of the Application of	)	<b>DECISIONS</b>
<b>Verizon Wireless</b>	)	
	)	
for a Special Use Permit to build a	)	
Wireless Communications Facility at	)	
<u>16224 Vail Road SE, Yelm, WA</u>	)	

**SUMMARY OF DECISIONS**

Based on a review of the record as a whole, the Appellants failed to show that the SEPA Responsible Official's May 3, 2018 environmental threshold determination was not based on sufficient evidence to determine the proposal's environmental impacts, or that the MDNS was clearly erroneous. The SEPA appeal is **DENIED**. The special use permit to operate a wireless communications facility as proposed herein is **GRANTED** subject to conditions.

**SUMMARY OF RECORD<sup>1</sup>**

**Request**

Odelia Pacific on behalf of Verizon Wireless (Applicant) requested approval of a special use permit to construct a new unstaffed wireless communications facility. The proposal includes a

<sup>1</sup> Findings begin on page 11.

150-foot monopole, 12 wireless communications antennas, a microwave dish, and a structure to house all ground equipment all located in a 40-foot by 40-foot fenced area of an underlying 64.04-acre parcel. The proposed site is located at 16224 Vail Road SE in Yelm, Washington.

### **Procedural History**

Thurston County Resource Stewardship Department originally reviewed the proposal for compliance with the requirements of the State Environmental Policy Act (SEPA) and issued a determination of non-significance (DNS) on August 25, 2015. The 2015 SEPA DNS was appealed by the Deschutes Neighborhood Group (Appellants, DNG). The Thurston County Hearing Examiner conducted a consolidated open record public hearing on the SUP request and SEPA appeal on March 15, 2016. Following scheduled post-hearing briefing, on May 18, 2016, a decision was issued granting the SEPA appeal, concluding that environmental factors had not been adequately considered and that MDNS issuance had not been based on information sufficient to evaluate the proposal's probable adverse environmental impacts to protected species using the wetlands in the vicinity. The matter was remanded to the County for additional environmental review.

On May 3, 2018 the Thurston County Community Planning and Economic Development Department issued a revised SEPA mitigated determination of non-significance (MDNS) based on review of additional environmental information.<sup>2</sup> Deschutes Neighborhood Group timely appealed the revised environmental threshold determination. On September 11, 2018, the Thurston County Hearing Examiner convened a consolidated open record public hearing on the appeal of the SEPA MDNS and on the underlying special use permit application; testimony on the SEPA appeal did not complete on the first day. The hearing reconvened on September 14, 2018, on which date the SEPA appeal hearing concluded and the special use permit application was heard. Prior to adjournment of the proceedings, a schedule for post-hearing legal argument in the SEPA appeal was agreed to. The parties timely submitted post-hearing argument.

### **Issues on Appeal**

On May 24, 2018, Chris Nubbe and Alison Baker on behalf of the Deschutes Neighborhood Group timely appealed the MDNS, alleging the following (paraphrased, reorganized) errors on appeal:

1. Application incompleteness because: 1) expired; 2) property owner affidavit signed by person now deceased; 3) site plan incomplete/inaccurate in its depiction of critical areas;
2. Alleged incorrect information in application materials including: 1) bad info in Applicant's habitat assessment report; 2) inaccurate RF coverage analysis; 3) biologist's report citing incorrect USFWS guidelines; 4) failure to conduct balloon test per code;

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<sup>2</sup> In the intervening years between the first hearing and the second SEPA determination, the name of the County department that reviews land use applications was changed.

3. Procedural errors including processing application despite being within 1,000 feet of wetlands;
4. Disputing adequacy of Applicant's evidence on lack of danger to protected bird species; and
5. Challenge based on Appellants' measurements of EMF levels around cell towers, including a challenge to the County's acceptance of the federally accepted EMF levels and federal regulations relating to safety of wireless technology, and a request to apply the "anti-commandeering doctrine" to overcome federal pre-emption of human health effects of wireless facilities.<sup>3</sup>

Following the pre-hearing order, the Appellants submitted a pre-hearing motion to vacate the MDNS and to deny the SUP. In responding to the Appellants' motion to vacate, the Applicant objected to the County's consideration of any challenge based on the alleged health effects of the wireless technology. The undersigned ruled on the motion declining to vacate the MDNS, which was required to be heard in an open record hearing. However, because the issue of health effects of wireless technology is pre-empted by federal regulation, it is not within the County Hearing Examiner's scope of authority. The issue was excluded from the proceedings.<sup>4</sup>

### **Testimony**

#### ***SEPA Appeal***

At the September 11, 2018 open record public hearing, the following individuals presented testimony under oath during the SEPA appeal portion of the proceedings:<sup>5,6</sup>

#### *For the Appellants*

Chris Nubbe  
Alex D. Foster, USDA Research Ecologist and local landowner  
Carol Moulton  
Carolyn Chew  
Erika Fehr  
Linda Chiles  
Sally Nole  
Deena Reeves

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<sup>3</sup> In their appeal and their pre-hearing motion (hearing brief), Appellants did not claim that the Applicant is not in compliance with FCC regulations, but rather that FCC regulations are inadequate and should be disregarded by the County.

<sup>4</sup> Testimonial evidence regarding RF health impacts was excluded during the 2016 hearing as well. (see Finding 15)

<sup>5</sup> For the sake of expediency, testimony of witnesses called by the parties was taken at one time and accepted as applicable to both the SEPA appeal and the SUP permit hearing, without the need to recall witnesses or hear duplicative testimony.

<sup>6</sup> Public comment on the permit application was taken out of order at 1 pm on September 11, 2018, as advertised in the hearing notice, in order to allow those who could not stay for the entire hearing to be able to attend at a specific time and testify. Audience members present were also informed that written comments could be submitted up until the close of the public comment period.

Sue Danver  
Bob Wadsworth  
Rella Schaefer  
Diane Dondero  
Albert M. Manville, Ph.D.  
Alison Baker

*For the Applicant*

Sarah Telschow, Land Use Planner, Odelia Pacific Corp  
Paul Kerlinger, Ph.D., Independent Consulting Biologist

*For the County*

Tony Kantas, SEPA Responsible Official, Thurston County

***Special Use Permit Application***

The following individuals provided testimony under oath in the September 11, 2018 open record public hearing on the special use permit application:

Tony Kantas, Thurston County Community Planning and Economic Development  
Sarah Telschow, Land Use Planner, Odelia Pacific Corp

*Public Comment*

Harry Miller	Dr. John Ruhland
Christine Hartman	Alan James Hultengren
Kiersten Slevin	Bob Hastings
Mary Abramson	Riley Slevin
Jeanne Jarecki	Sue Danver
Alison Baker	Carolyn Chew
Cheryl Lynn Love	Carol Moulton
Chris Nubbe	Steven Knopp
Diane Dondero	

**Attorney Representation at 2018 hearing**

Charles E. Maduell, Attorney, represented the Applicant.  
Travis H. Burns, Deputy Prosecuting Attorney, represented Thurston County.  
Appellants were not represented by counsel in the 2018 proceedings.

**Exhibits**

The following exhibits were admitted in the record of this matter:<sup>7</sup>

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<sup>7</sup> Exhibits admitted in both hearings are included in the record of this matter. Public comment offered at the 2016 hearing is included in these findings together with the public comment from September 11, 2018. Exhibits newly offered in 2018 proceedings start at D27 for Appellants, C6 for the County, and V23 for the Applicant.

For the Appellants, Deschutes Neighborhood Group:

- D1. First declaration of Alex D. Foster, dated November 30, 2015
- D2. Supplemental declaration of Alex D. Foster, dated December 15, 2015
- D3. Second supplemental declaration of Alex D. Foster, dated December 22, 2015
- D4. Email exchange between Tony Kantas, Sarah Telschow, and Michelle Tirhi, dated January 14, 2016
- D5. Wildlife species list, as part of first declaration, with additional pictures of the new 163rd Lane PHS Priority II waterfowl concentration area and adjacent Smith Ranch wetland restoration areas, compiled by Alex D. Foster
- D6. Email exchange between Rick Peters, Mike Kain, Tony Kantas, Theresa Nation, Darric Lowery, and Michelle Tirhi, dated December 1-21, 2015
- D7. Map of WDFW PHS waterfowl concentration areas near the proposed wireless communications facility (WCF) with approximately 1,000-foot buffers drawn around them including the new 163rd Lane Priority II concentration area, compiled by Alex D. Foster and approved by Michelle Tirhi, WDFW, dated January 24, 2016
- D8. Statement about tower effects to local birds and their habitats near the WCF site, Black Hills Audubon Society
- D9. Comments regarding effects to birds, threatened and endangered species, NEPA/SEPA, and other legal statute compliance relating to the Lake Lawrence cell tower proposal, Albert Manville II, Ph.D., US Fish and Wildlife Service
- D10. Bojana M. Foster Comment regarding cell tower effects to property values of nearby land owners from cell towers,
- D11. Large area locator map poster for use during testimony at hearing
- D12. Email exchange between Alex D. Foster and Lisa Chetnick Treichel, Office of Environmental Policy and Compliance, Office of the Secretary, US Department of the Interior, regarding cell tower NEPA compliance, dated January 12, 2016
- D13. NEPA compliance acknowledgement signed by Lelah Vaga for Verizon Wireless, dated March 3, 2015
- D14. Maps, video, and photographs showing current local wireless coverage area, current telecommunications structures, and proposed tower locations, photographs and measurements taken by Chris Nubbe, (URL for YouTube video provided)
- D15. Declaration regarding impacts of cell towers on bee populations and habitat, with attached exhibits, Thomas J. Mani
- D16. Declaration showing wetland delineations and other boundaries within 1,000 feet of the proposed tower site and designation of tier 2 waterfowl concentration in vicinity of proposed cell tower, with attachments, prepared by Chris Nubbe
- D17. Email exchange between United States Army Corp of Engineers and Chris Nubbe, dated January 11-21, 2016

- D18. Email exchange between SHPO officials and Chris Nubbe, dated January 11, 2016
- D19. Resume of Alex D. Foster
- D20. Resume of Chris Nubbe
- D21. Resume of Thomas J. Mani
- D22. Visual assessment of the Lake Lawrence cell tower, including photographs, compiled by Jean-Marie Mason
- D23. Declarations and affidavits prepared by concerned members of the Deschutes Neighborhood Group objecting to proposed cell tower based on impacts to neighborhood character, critical areas and wildlife, and existing view corridors
- D24. Styring report regarding bird habitats and bird movements near the WCF
- D25. Written testimony, Chris Nubbe
- D26. Hearing testimony outline, Alex D. Foster
- D27. 2018 MDNS Appeal letter, with attachments
- D28. Ron Smith Ranch restoration projects, agreements, permits, plans, and documents
- D29. Photographs of current Smith Ranch restoration projects, submitted by Alex Foster
- D30. Plans, recorded documents, study reports, and review comparisons of what has been submitted for this project versus what is required to be submitted
- D31. Phone message from Michelle Tirhi, WDFW, to Alex Foster, dated May 24, 2018
- D32. Transcript of phone message from Michelle Tirhi, WDFW, to Alex Foster, dated May 24, 2018
- D33. Bird Identification Handbook used in Appellants bird study and sample flight path data sheets
- D34. Comments regarding Dr. Paul Kerlinger's April 13, 2018 avian risk assessment, Dr. Albert Manville, dated May 17, 2018
- D35. Response to April 12, 2016 post hearing brief filed by Verizon, Dr. Albert Manville, dated April 14, 2016
- D36. Rebuttal to comments submitted by Mr. Jeffrey S. Jones, J.S. Jones and Associates, on behalf of Verizon Wireless, Dr. Albert Manville, dated February 21, 2016
- D37. Protocol for pre- and post-construction monitoring of impacts from proposed communication tower, Dr. Albert Manville, dated July 8, 2016
- D38. Response to Verizon's August 7, 2018 Applicant's Response to Appellants' Dispositive Motion, Dr. Albert Manville, dated August 13, 2018
- D39. Comments submitted for September 11, 2018 MDNS and SUP hearing, Dr. Albert Manville

- D40. Federal Communications Commission regulations and associated documentation relating to the Telecommunications Act
- D41. Hearing testimony of Alex Foster
- D42. Appellants' witnesses written testimonies
- D43. Written testimony of Dr. Albert Manville (who testified on September 11th)
- D44. [Not admitted]<sup>8</sup>

For the Applicant:

- V1. Resume of Jeffery S. Jones
- V2. Critical area feasibility study, prepared by Jeffery S. Jones, dated June 6, 2013
- V3. Habitat assessment, prepared by Jeffery S. Jones, dated March 16, 2015
- V4. Balloon test results/photo simulations
- V5. Balloon test photos, taken by Tim Bradley on May 10, 2014
- V6. Photo simulations, prepared by Tim Bradley Imaging
- V7. Letter from Tim Bradley regarding balloon test/photo simulations, dated November 12, 2015
- V8. Architectural/engineering drawings, dated June 17, 2015
- V9. Letter from Jeffery S. Jones to Tony Kantas, Associate Planner, regarding OLY Lake Lawrence, Thurston County Code Section 20.33.080(2)(e)(i), dated February 15, 2016
- V10. Resume of Andrew H. Thatcher
- V11. Declaration of Jeffery S. Jones, submitted in support of Applicant's Response to Appellant's Motion to Require Withdrawal of DNS, dated December 14, 2015
- V12. Tree heights letter, Duneanson Company Inc., dated March 11, 2016
- V13. Thurston County special use permit required findings
- V14. Letter to surrounding customers with text message response, dated October 21, 2015
- V15. Professional summary of Alan Burt, Acoustical Consultant
- V16. Letter regarding likelihood of catching fire, dated November 16, 2015
- V17. Federal Airways and Airspace Summary Report
- V18. Professional summary of Marc Doman

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<sup>8</sup> Although this document was accepted at hearing in the nature of information supporting an offer of proof, during deliberations the undersigned has determined that it should be excluded consistent with the Ruling on Appellants' motion to vacate MDNS. Because the Land Use Petition Act (LUPA, RCW 36.70C.120(2)(c)) affords parties the opportunity to supplement the factual record on issues outside the scope of the authority of the hearing examiner during the local government land use hearing, there is no reason to admit this evidence in the instant record. It was neither reviewed nor relied on in entering these findings and conclusions.

- V19. PowerPoint presentation, dated March 15, 2016
- V20. Two photo simulations
- V21. Three photo simulations
- V22. Applicant's Memorandum of Law regarding compliance with Federal Communications ACT requirements
- V23. Addendum to avian risk assessment for the Verizon Wireless Vail Road Wireless Communications Facility, prepared by Paul Kerlinger, Ph.D., dated August 27, 2018
- V24. Resume of Paul Kerlinger, Ph.D.
- V25. Email from Michelle Tirhi, WDFW to Theresa Nation, WDFW, and Tony Kantas, Thurston County, regarding Project No. 2015103966, Verizon Wireless OLY Lake Lawrence (Vail Road Site) aviation risk assessment, dated April 28, 2018
- V26. Applicant's Memorandum in Opposition to SEPA Appeal, dated September 6, 2018
- V27. Declaration of Jeffery Jones, dated April 26, 2016
- V28. Email from C. Tessaglia-Hymes to Paul Kerlinger
- V29. Paul Kerlinger testimony outline, dated September 14, 2018

For the County:

- C1. Resource Stewardship Land Use and Environmental Section report on special use permit, including the following attachments:
  - A. Notice of public hearing
  - B. Master application, received May 12, 2015
  - C. Special use permit application, received May 12, 2015
  - D. Vicinity aerial map, dated 2012
  - E. Zoning map
  - F. Wetlands map
  - G. Gopher soils map
  - H. Prairie soils map
  - I. Applicant's project description (28 pages)
  - J. Site/structure plan set (20 pages)
  - K. Application submittal routing form (2 pages)
  - L. Notice of application (3 pages), dated June 18, 2015
  - M. SEPA determination of non-significance (DNS, 2 pages), issued on August 25, 2015
  - N. Appeal of the DNS by Deschutes Neighborhood Group, received September 15, 2015



- O. Letter from the Appellants' attorney, dated October 27, 2015
- P. Thurston County Public Works SEPA recommendation, dated August 18, 2015
- Q. Thurston County Public Works special use permit recommendation, dated August 19, 2015
- R. Thurston County Health Department recommendation, dated August 5, 2015
- S. Email from Washington State Department of Fish and Wildlife, dated December 21, 2015
- T. Comment letter, Washington State Department of Ecology, dated June 12, 2015
- U. Comment letter, Washington State Department of Ecology, dated July 13, 2015
- V. Comment letter, Nisqually Indian Tribe, dated June 26, 2015
- W. SEPA environmental checklist
- X. Balloon test letter to surrounding property owners, dated April 23, 2014
- Y. Balloon test letter to Thurston County, dated April 16, 2014
- Z. Balloon test
- AA. Acoustical report, dated April 21, 2015
- BB. MHz bands license
- CC. Third party review, dated July 24, 2015
- DD. RF documentation
- EE. Non-ionizing electromagnetic exposure analysis and engineering certification, revised April 12, 2015
- FF. TOWAIR determination results
- GG. Co-location statement
- HH. FAA compliance acknowledgment
- II. Property owner acknowledgment of affidavit
- JJ. Tower owner affidavit
- KK. NEPA compliance acknowledgment
- LL. Availability of tower collocation to AT&T, Sprint, and T-Mobile (3 pages), dated July 24, 2014
- MM. Color sample - Sherwin Williams Rock Garden (SW6195)
- NN. Letter from Odelia Pacific Corporation, dated July 1, 2015
- OO. Letter from Odelia Pacific Corporation, dated August 5, 2015
- PP. Critical area feasibility, dated June 6, 2013
- QQ. Habitat assessment, dated March 16, 2015

- RR. Market study, dated January 29, 2015
- SS. Communication pole design calculations
- TT. Geotechnical report, dated February 16, 2015
- UU. Short form construction stormwater pollution prevention plan (SWPPP) template
- VV. Abbreviated stormwater site plan report, dated June 12, 2015
- WW. Twenty-six comment letters received in response to the notice of application (See Appendix G)
- XX. Sixty-two comment letters and a petition received in response to the 2015 determination of non-significance (See Appendix G)
- YY. Thirty-one comment letters received in response to the notice of public hearing (See Appendix G)
- ZZ. Email comments from WDFW with two attached articles regarding migratory birds, correspondence concluding January 15, 2016
- AAA. Letter from J.S. Jones and Associates, Inc. regarding TCC 20.33.080(2)I(i), with attachment, dated February 15, 2016
- BBB. Email from WDFW, dated February 22, 2016
- CCC. Comment letter from Albert M. Manville, II, Ph.D., dated February 21, 2016
- DDD. Submitted testimony of Albert M. Manville, II, Ph.D.
- EEE. Applicant's proposed anti-nesting device
- C2. Photos of public hearing notice
- C3. Four photos of on-site vegetation
- C4. Four photos of off-site wetland to the northwest
- C5. Sixteen comment letters in response to the 2016 Staff Report (See Appendix H)
- C6. Staff report in the September 2018 public hearing on the DNG appeal of the MDNS (entitled Addendum to March 15, 2016 Staff Report), including the following attachments:
  - A. Appeal of an administrative decision, received May 24, 2018
  - B. Appellants' Motion to Vacate Mitigated Determination of Non-Significance and Deny SEPA Permit
  - C. Re-issuance of SEPA determination, mitigated determination of non-significance (MDNS), dated May 3, 2018
  - D. Lake Lawrence waterfowl/migratory bird survey report, prepared by Trileaf Corporation, dated October 13, 2017
  - E. Early spring migration and local bird flight near proposed Lake Lawrence cell tower site, prepared by Alex D. Foster, Research Ecologist, dated October 15, 2017

- F. Avian risk assessment for Verizon Wireless Vail Road Wireless Communications Facility, prepared by Paul Kerlinger, Ph.D., dated April 13, 2018
- G. Memo from State of Washington Department of Fish and Wildlife, dated November 24, 2017
- H. Email from Michael Green, Deputy Chief, regarding migratory birds and habitat program USFWS, Pacific Region, dated July 27, 2018
- I. US Fish and Wildlife Service recommended best practices for communication tower design, siting, construction, operation, maintenance, and decommissioning, dated April 2018
- J. Hearings Examiner's remand decision, dated May 18, 2016
- K. Sixty-three comment letters received in response to the May 3, 2018 mitigated determination of non-significance (MDNS) (See Appendix B)
- C7. Photo of the site
- C8. Thirty-four comment letters on the 2018 notice of public hearing (See Appendix C)
- C9. Eight written public comments submitted during the special use permit hearing on September 11, 2018 (See Appendix D)

Also included in this record are significant pre- and post-hearing submittals, motions, orders, and briefing detailed in Appendices A, E, and I at the end of this decision.

Based upon the record developed at the open record hearings, the Hearing Examiner enters the following findings and conclusions addressing the 2018 SEPA appeal and the special use permit.

## **FINDINGS**

### Proposal, Description of Site, and Surroundings

1. Odelia Pacific on behalf of Verizon Wireless (Applicant) requested approval of a special use permit to develop a wireless communications facility (WCF) comprised of the following primary features: a 150-foot monopole with 12 panel antennas resulting in a total 156-foot antenna height; microwave dish; remote radio units, AC units, and surge protectors to be housed in seven equipment cabinets; and a 30kw diesel back-up generator. The generator and its 210-gallon diesel tank would be housed in the equipment area. The monopole and antenna/attachments would be painted a dark green-grey color with a non-reflective finish. The proposal includes a landscape plan with a 20-foot planted buffer. In addition, a 50-foot wide tree retention buffer would be provided around all sides of the fenced enclosure, only interrupted by the access. No water or sanitary facilities are proposed for the unstaffed facility. The proposed enclosure would be surrounded by a six-foot tall chain link fence topped with three strands of barbwire and fitted with green privacy slats. Anti-climbing devices would be installed on the tower. Access would be from an existing driveway serving the subject property. A portion of the existing private driveway would be required to be extended and upgraded to include an emergency vehicle hammerhead turnaround near the fenced WCF

enclosure. The equipment area would have work safety lights used only during night maintenance or repair visits; the lights would have a timer and would automatically go off within an hour. Maintenance would be performed approximately once per month for an average of four hours by one or two technicians. *Exhibit C1.I; Telschow Testimony. Exhibits D4, pages 7-10, and C1.ZZ, pages 4-5.*

2. The subject property is addressed as 16224 Vail Road SE in Yelm, Washington.<sup>9</sup> It and the adjacent parcels to the south and west are zoned Long-Term Agriculture (LTA). Adjacent properties to the north are zoned Rural Residential Resource one dwelling Unit per Five Acres (RRR 1/5), and adjacent properties to the east are zoned Residential LAMIRD two dwelling units per acre (RL 2/1). *Exhibits C1 and C1.E.* Agriculture is intended to be the primary use in the LTA zone; other uses must be sited so as to minimize their impact on, or conflicts with, surrounding agricultural uses. *TCC 20.08A.010.*
3. To the north, surrounding land uses are comprised primarily of rural residences and agriculture uses on parcels generally five acres in size or larger. Two adjacent parcels totaling 39.26 acres northeast of the proposed WCF location were in the same ownership as the subject property at the time of the 2016 public hearing. Approximately 2,800 feet to the east of the proposed tower location is a single-family residential development known as the Plat of Edwards Lake Lawrence. Adjacent to the south of the subject property and bordering the Deschutes River is a 193-acre former agricultural property known as the Smith Ranch Mitigation area, owned by the cities of Yelm, Olympia, and Lacey, which is currently undergoing restoration and enhancement to serve as a mitigation project for municipal water rights acquisition. Planned improvements include wetland creation, stream channel restoration and alteration, and native plantings, at a total projected cost between 1.4 and 1.7 million dollars. *Exhibits C1, C1.D, C1.BBB, and D1. D, Initial Acquisition and Restoration Assessment of Smith Ranch, prepared for Cities of Lacey, Olympia, and Yelm, and D26.* Although the resulting habitat is intended to be used by wildlife, as of the time of the instant hearing, Thurston County does not acknowledge the Smith Ranch Mitigation area as a wildlife refuge because it has not been so designated by a state or federal agency. *Exhibit C6; Tony Kantas Testimony.*
4. The underlying 64.04-acre subject property contains a wetland approximately 1,900 feet to the east of the proposed WCF location. The proposed project site is not within the jurisdiction of the Shoreline Master Program for the Thurston Region (SMPTR) or within any critical areas or associated buffers regulated by the Thurston County critical areas ordinance (CAO). There is a 27-acre off-site wetland located at its closest point approximately 430 feet to the west/northwest, referred to in these proceedings as the 163rd Lane wetlands; it has been identified as a Priority 2 waterfowl concentration area by WDFW. The Deschutes River and associated riparian wetlands are located approximately 800 to 900 feet to the south and southeast of the proposed WCF. Lake Lawrence is located approximately 4,200 feet east of the site; it is a Priority 1 waterfowl

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<sup>9</sup> The legal description of the subject property is a portion of Sections 19/20/29/30, Township 16N, Range 2E; also known as Tax Parcel No. 22629220201. *Exhibit C1.*

concentration area. The Smith Ranch Mitigation area, on which wetlands and stream channels are being developed and/or restored, provides additional open waterbody features approximately 1,125 feet to the southeast. *Exhibits C1, C1.D, V2, Figure 2, USFWS National Wetlands Inventory map, D4, D6, D7 page 5, D8, and D26.*

5. The portion of the subject property on which the cell tower is proposed is slightly sloped with the highest elevation near Vail Road. The proposed WCF site is flat. The single-family residence nearest to the project site is 310 feet to the northwest. *Exhibit C1.*

#### Procedural Background

6. The special use permit application for a proposed wireless communications facility was submitted together with an environmental checklist May 12, 2015. Notice of application and the checklist were mailed to all property owners within 2,600 feet of the subject property, as well as to the Washington State Department of Fish and Wildlife (WDFW), the US Army Corps of Engineers (ACOE), the Washington State Department of Ecology (DOE), the Nisqually Tribe, the Chehalis Tribe, the Olympic Region Clean Air Agency (ORCAA), and to several Thurston County review departments. *Exhibits C1, C1.K, and C1.L.*
7. Pursuant to the State Environmental Policy Act, the Thurston County Resource Stewardship (RDS) Department was designated lead agency for review of the proposal's environmental impacts. The SEPA Responsible Official issued a determination of non-significance (DNS) on August 25, 2015. *Exhibits C1 and C1.M.* The DNS was timely appealed and, following pre-hearing procedures that ran from September through December 2015, a consolidated open record hearing was conducted on the SEPA appeal and the special use permit on March 15, 2016.<sup>10</sup> Following the hearing and post-hearing legal briefing, on May 18, 2016 the SEPA appeal was granted and the DNS was remanded for further review of impacts to bird species from the proposed tower. *Exhibit C6.J.*
8. After both the Applicant and the Appellants submitted site-specific study of bird presence and flight paths between the waterbodies in question, and review of these studies by the Washington Department of Fish and Wildlife (WDFW), the County's SEPA Responsible Official issued a revised mitigated determination of non-significance (MDNS) on May 3, 2018. *Exhibit C6.C.*
9. On May 24, 2018, the Deschutes Neighborhood Group (Appellants, DNG) submitted a timely appeal challenging the County's 2018 MDNS. The appeal asserted the following (paraphrased/reorganized) issues on appeal: 1) Application incompleteness because: a) expired; b) property owner affidavit signed by person now deceased; c) site plan incomplete/inaccurate in its depiction of critical areas; 2) Alleged incorrect information in application materials including: a) bad info in Applicant's habitat assessment report; b) inaccurate RF coverage analysis; c) biologist's report citing incorrect USFWS guidelines;

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<sup>10</sup> Pre-hearing procedures prior to the 2016 SEPA appeal are spelled out in detail in Findings 7 through 14 in the May 18, 2016 Remand Decision (Exhibit C6.J), as well as in the pre-hearing documents in Appendix E.

d) failure to conduct balloon test per code; 3) Procedural errors including: a) processing application despite being within 1,000 feet of wetlands; 4) Disputing adequacy of Applicant's evidence on lack of danger to protected bird species; and 5) Challenge based on Appellants' measurements of EMF levels around cell towers, including a challenge to the County's acceptance of the federally accepted EMF levels and federal regulations relating to safety of wireless technology, and a request to apply the "anti-commandeering doctrine" to overcome federal pre-emption over claims of health effects of wireless facilities. Of note, Appellants did not claim that the application is not capable of compliance with FCC regulations, but rather that FCC regulations are inadequate and should be disregarded by the County. *Exhibit C6.A.*

10. Notice of the hearing on the MDNS appeal was sent to parties of record and posted on-site. *Exhibit C7; Tony Kantas Testimony.*
11. At the outset of the appeal hearing, Applicant's counsel requested that the undersigned exclude evidence on the health effects of RF emissions consistent with the previous order ruling on Appellants' dispositive motion. This request was granted, as RF health effects are preempted by federal law and challenges to the adequacy of County regulations are outside the scope of a hearing examiner's authority. Also, when Appellants opened SEPA appeal arguments challenging the adequacy of the SUP application and compliance of the SUP application materials with the County Code's wireless communications provisions, Applicant's counsel objected to these arguments against the SUP being heard in the SEPA appeal. It was clarified at the beginning of the SEPA hearing that the scope of the appeal was limited to challenging the 2018 MDNS and that, even as SEPA appellants, the Appellants lack standing/the time is not ripe to challenge the SUP, which as of the public hearing had not been decided and cannot be appealed until a decision is made. This document is that decision.

*Additional Study and Mitigated Determination of Non-Significance*

12. Following the May 2016 remand of the MDNS, two studies were undertaken of bird presence and flight paths around the proposed WCF site. The Applicant commissioned site specific bird study by an environmental consulting firm (Trileaf) to document waterfowl and migratory bird movement patterns and use of habitat corridors surrounding the project site and the nearby wetlands, entitled "Lake Lawrence Waterfowl/Migratory bird survey report", dated October 13, 2017 (Trileaf study). Bird observation surveys were conducted for four hours around dawn and four hours around dusk on three consecutive days in January and in April 2017 by a subcontractor (Anchor QEA). The six January winter observation periods reported 892 total individual birds observed of 39 species. The six April spring observation periods reported 499 individual birds observed of 47 species. Of the species observed, the study identifies three as listed as endangered or threatened under the federal Endangered Species Act and 10 as included in the WDFW Priority Species list, but none of which were observed flying over the tower site. The listed/priority species birds observed included: bald eagle, band-tailed pigeon, bufflehead, great blue heron, hooded merganser, northern goshawk, peregrine falcon, pileated woodpecker, Vaux's swift, and yellow-billed cuckoo. (This last bird was not seen but its

call was heard.) The Trileaf study reported that perching bird flight paths were generally observed to be within 20 feet of the ground with the exception of crows and ravens, which flew between 200 and 400 feet off the ground in the evenings. Waterfowl and wading species were observed departing from/landing at the 163rd Lane wetlands, typically from either the Smith Ranch area or the Deschutes River riparian area; no waterfowl were observed in the airspace over the project site. The only species observed flying over the proposed tower site were crows (at the evening heights noted above); one American robin was observed foraging on the ground in or near the tower site. The Trileaf study concluded that except for crows, who fly at 200 feet or higher, birds in the project vicinity preferred flight paths through open areas away from the conifers surrounding the tower site. *Exhibit C6.D.*

13. Another site-specific study was designed and administrated by DNG member Alex Foster for the Deschutes Neighborhood Group, entitled the "Early Spring migration and local bird flight near the proposed Lake Lawrence cell tower site, Thurston County, Washington", dated October 15, 2017 (Deschutes/Black Hills study, citizen science study). Following citizen scientist training, volunteers partnered with Black Hills Audubon Society conducted observations over the course of 15 weeks (January 12 through April 27, 2017), including 290 hours of total observation time from three points around the proposed tower site, and 10 hours of observation at two waterfowl concentration areas near the site. Seasonal and diurnal patterns of bird flight were observed. Approximately 7,043 birds of 58 species were observed, including 13 species of concern on state priority and/or Audubon conservation lists. Survey results identified a circular local migratory flyway between waterfowl concentration areas at Lake Lawrence, the Smith Ranch wetlands, and the 163rd Lane wetlands used by waterfowl, raptors, and crows. The DNG citizen science study concluded that the proposed placement of the WCF was likely to result in a flight obstacle hazard for birds, especially in low light, fog, or other lower visibility weather conditions. The study concluded that given the presence of the Deschutes River (which is an attraction for birds of all species), it would be best to place the tower further away from the river floodplain and bird concentration areas. *Exhibit C6.E; Alex Foster Testimony; Exhibit D41.*

14. The two site-specific bird studies were routed to Washington Department of Fish and Wildlife (WDFW) for review prior to the SEPA environmental threshold determination. WDFW specifically commented that both studies were valid, but on a point by point comparison, found the citizen science study to be the more rigorous of the two. WDFW determined that both studies concluded that the proposed tower location is within the flight path of migratory and waterfowl species, although with the exception of raptors, it is a minor flight path. The state agency's November 24, 2017 comments noted:

The potential impact to all species is greatly reduced due to the tower being in a lesser flight path combined with the lack of lighting and guy wires proposed on the tower (two of the elements causing more bird mortality according to the US Fish and Wildlife Service). However at 150 feet, the tower will be taller than the surrounding timber in the forest stand it is proposed [average of 116 feet

according to Deschutes/Black Hills and 130 feet according to Trileaf] and could result in some bird strikes as birds fly above the timber stand to Lake Lawrence and the Smith Ranch Mitigation area. .... Based on the studies, WDFW finds that up to 10 species listed as priority according to the WDFW PHS program/federally endangered or threatened/species of local importance were documented in the study area and may occasionally fly to and from the wetlands, staging areas, or rookeries that are within 1,000 feet of the proposed tower site. ... Thurston County should view [the Smith Ranch Mitigation area] in the same vein as a wildlife and habitat refuge. As such, the proposed cell tower would be within 1,000 feet of two waterfowl concentration areas (163rd Lane wetland and Smith Ranch Mitigation area), one of which serves as a publicly owned refuge.

*Exhibit C6.G.*

15. Because WDFW's comments remained critical of placement of the proposed tower near wetlands and/or flyways, Planning Staff and the Applicant agreed that the two site-specific bird surveys needed to be peer reviewed by a third party reviewer. *Exhibit C6.* The Applicant commissioned an avian risk assessment by an expert in the field, Paul Kerlinger PhD. *Exhibit V24.* Dr. Kerlinger reviewed the site-specific birds surveys by both the citizen scientists and the Applicant's consultants in conducting his risk assessment, as well as available peer reviewed scientific papers on the topic of bird collisions with towers. On April 13, 2018, he issued an avian risk assessment that concluded that because the proposed tower is relatively short, unlit, and not supported by guy wires, the risk of avian collision is very small. Also considering geographic location and topography/ habitat, the assessment found no significant risk. Regarding geography, there are few (if any) reported bird tower collision deaths in Washington State. With respect to topography/ habitat, Dr. Kerlinger reported that the literature on bird tower collision risk contains no empirical evidence of increased tower collision fatalities near wetlands or wildlife refuges. Reviewing both site-specific bird surveys, Dr. Kerlinger concluded that they do not show large scale migration of large numbers of birds flying at or near the tower site; however, even if the number of birds in the area were greater than reported in these two studies, for example due to increased bird presence at Smith Ranch, the characteristics of the tower as proposed would result in negligible risk to birds. The assessment stated that "there is no evidence that towers the height and style of the proposal kill significant numbers of birds, and little to no evidence that they kill any birds." *Exhibit C6.F, page 27.* With respect to disruption or interference with migration paths or bird flight patterns, the avian risk assessment stated that the evidence shows that birds simply fly around small obstacles, that an unlit tower standing 40 feet above surrounding trees would not pose a major obstacle to flight, and that the small deviation required to fly around the tower would not constitute significant disruption in local flight patterns. *Exhibit C6.F, page 28.*



16. The Applicant's avian risk assessment was also sent to WDFW for review and comment during the SEPA review process. WDFW biologist Michelle Tirhi, whose comments had played a significant role in the 2016 hearing and remand, reviewed Dr. Kerlinger's assessment and submitted the following comment:

Thank you for the opportunity to review the Avian Risk Assessment prepared by Kerlinger. It is a thorough review of cell tower and wildlife interaction and I conclude with much of the content. As noted in our 24 November 2017 official response, WDFW does suggest the county consider the Smith Ranch Mitigation Area as a wildlife and habitat refuge. Thus, the proposed tower location is within 1,000 ft of two waterfowl concentration areas (163rd wetlands, Smith Ranch Mitigation Area), one of which serves as a publically owned refuge. Collectively, this placement does put wildlife at more risk. However, I think the applicant has adequately analyzed that risk and I concur with the conclusion that the risk of bird strikes exists but is low due to the height and design of the tower.

*Exhibit V25.*

17. The County's SEPA Responsible Official then issued a mitigated determination of non-significance which was based on (not necessarily limited to) review of the following documentation:

- Thurston County Master Application, dated May 12, 2015
- Special Use Permit Application, dated May 12, 2015
- Environmental Checklist, dated May 12, 2015
- Critical Areas Feasibility Study, dated June 6, 2015
- Habitat Assessment, dated March 16, 2015
- Project Description
- Communication Pole Design Calculations
- Geotechnical Report, dated February 16, 2015
- Market Study, dated January 29, 2015
- Property Owner Acknowledgment of Affidavit, dated April 21, 2015
- Tower Owner Affidavit, dated April 3, 2015
- Oly Lake Lawrence – RF Documentation
- Acoustical Report, dated April 21, 2015
- ALS License
- Non-Ionizing Electromagnetic Exposure Analysis & Engineering Certification, revised April 12, 2015
- Paint Sample
- FAA Compliance Acknowledgment, dated April 3, 2015
- FAA Lighting Documentation – TOWAIR Determination Results
- Co-Location Statement, dated April 3, 2015
- Availability of Tower for Collocation
- NEPA Compliance Acknowledgment, dated April 3, 2015
- Letter from Verizon Wireless, dated April 23, 2014
- Third Party Review by ADCOMM Engineering Company, dated July 24, 2015

- Site Photos
- Site Plans
- Notice of Application, dated June 22, 2015 (Mail Radius 2,600 feet)
- Comment Letters and Emails received in Response to Notice of Application
- Response Letter from Odelia Pacific Corporation, dated August 5, 2015
- Response Letter from Odelia Pacific Corporation, dated July 1, 2015
- Comment Letter from Washington State Department of Ecology, dated June 12, 2015
- Comment Letter from Nisqually Indian Tribe, dated June 26, 2015
- Comment Letter from Washington State Department of Ecology, dated July 13, 2015
- Memorandum from Thurston County Public Health, dated August 5, 2015
- Memorandum from Public Works, dated August 18, 2015
- Comment letters received in response to the Notice of Application and previous Determination of Non-Significance
- Thurston County Hearings Examiner Decision, dated May 18, 2016
- Bird Study, prepared by Alex D. Foster, Research Ecologist, dated October 15, 2017
- Lake Lawrence-Waterfowl/Migratory Bird Survey Report, prepared by Trileaf Corporation, dated October 13, 2017
- Washington State Department of Fish & Wildlife memorandum, dated November 24, 2017
- Avian Risk Assessment for the Verizon Wireless Vail Road Wireless communication Facility, prepared by Paul Kerlinger, Ph.D., dated April 13, 2018
- Comment Email from Michelle Tirhi, Washington Department of Fish and Wildlife, dated April 28, 2018

*Exhibit C6.C.*

18. The MDNS mandates compliance with the following mitigation measures:
- 1) In the event that archaeological deposits or skeletal material or features of a burial/interment situation are encountered, all work in the vicinity of the discovery area must stop immediately and contact made with the Washington State Historic Preservation Officer.
  - 2) Construction activity shall be limited to the hours of 7:00 a.m. to 7:00 p.m. to minimize associated noise.
  - 3) The proposed monopole shall not include any guy wires and any aviation obstruction lights.
  - 4) Night lights for the equipment area shall be controlled by a timer, so that there will be no lights except when technicians are present.
  - 5) The Applicant shall place hazing structures on the WCF to prevent birds from nesting on the WCF.

- 6) Additional conditions may be placed upon this project through the special use permit application.

*Exhibit C6.C.*

Arguments and Evidence on SEPA Appeal

Appellants' Case

19. Appellant group spokesman Chris Nubbe presented testimony and evidence to support the Appellants' position that Smith Ranch should be considered a wildlife refuge. *Exhibit D20 (resume)*. Documents submitted included an excerpt of a 2011 interlocal agreement between Yelm Olympia, and Lacey. *Exhibit D28*. Mr. Nubbe testified that the purpose of the Smith Ranch project was to reallocate water rights in the Deschutes River basin and that the agreement is retiring Ron Smith's water rights in order to be able to grant new water rights to the municipalities. The habitat restoration project is due to be complete in December 2018 and the parties are contractually obligated to maintain it for a minimum of 10 years. The Thurston County Code does not define wildlife refuge as being restricted to those owned by state or federal agencies; this one happens to be owned by municipalities. The Appellants argued that because the tower would be located between the 163rd Lane wetland and the Smith Ranch project, which should be considered a wildlife refuge, the WCF would pose a flight obstacle for birds. *Exhibits D28 and D29; Chris Nubbe Testimony*.
20. Mr. Nubbe also challenged the findings of the Applicant's site specific bird survey report prepared by Trileaf, arguing that it contained statements that were not entirely factual or accurate. Specifically, Figures 3 and 4 of the Trileaf study (*Exhibit C6.D*) identifies birds perching in the vicinity of the proposed WCF site but no flight paths to those perches. Mr. Nubbe argued that the Trileaf study's assertion that no waterfowl were observed to fly over the site is untrue, and that some of the citizen scientists witnessed a "V" configuration of waterfowl that flew directly over the tower site, allegedly directly over the head of the Trileaf data collectors. *Chris Nubbe Testimony; Exhibit D30*.
21. In his SEPA appeal testimony, Mr. Nubbe sought to argue that the materials submitted by the Applicant in support of the SUP application are not complete or accurate, thus challenging SUP approval. *Chris Nubbe Testimony*. He was not allowed to proceed with this line of appeal argument, as the issue of whether the SUP is ripe for decision - or should be approved - is not a question within the zone of interests addressed by SEPA.
22. Appellants presented the testimony of Alex Foster, a USDA research scientist, neighbor of the 163 Lane wetland, and member of Deschutes Neighborhood Group. *Exhibit D19 (resume)*. Mr. Foster designed the Deschutes/Black Hills citizen science study. Addressing his study, Mr. Foster noted that the tree heights in their study are based on County Lidar data that show heights among the stand of trees is fairly uniform. He contended that at 156 feet, the proposed cell tower would protrude above the average tree height by a little over 40 feet. He noted that volunteers were paired with one Audubon member per team, to improve species identification accuracy. He testified that the citizen observers frequently saw ducks or other waterfowl flying between Smith Ranch and the

163rd Lane wetland. Their observers witnessed Canada geese flying directly over the tower site, while ducks not as much. Both types of waterfowl flew at a low elevation near to the tree tops and also flew right along the floodplain above the valley bottom. They viewed few raptors in January and February, but more raptors arrived in March to coincide with the lambing, including bald eagles, red-tailed hawk, turkey vultures, and a few osprey. The raptors flew at high elevations and perched in trees around the ranch, likely attracted to stillborn lambs and birth waste. Overall, the Deschutes/Black Hills observers witnessed a lot of connectivity between the habitats along the floodplain. Mr. Foster opined that the 194 acres of Smith Ranch will be a pretty important anchoring point for wildlife in the area and that its completion will increase bird numbers in the vicinity of the proposed cell tower. Speaking to the Applicant's avian risk report, Mr. Foster challenged Dr. Kerlinger's assessment as not based on site-specific data, or even data that is focused on the Pacific Northwest. He argued that site specific evidence should be given greater weight than national evidence that was developed to address the requirements of the National Environmental Protection Act, rather than the State Environmental Protection Act. *Exhibits C6.E and D41; Alex Foster Testimony.*

23. In support of their SEPA appeal, the Appellants offered the testimony of Albert Manville, PhD, a former USFWS lead on effects to migratory birds from human built structures, coauthor of the 2013 USFWS tower citing guidelines, and current principal of a wildlife consulting firm based in Virginia. *Exhibit D38.* Dr. Manville submitted testimony and written comments on environmental impacts of the proposed WCF and also comments in response to the Applicant consultant's avian risk assessment and Applicant bird impact evidence. *Exhibits D34, D38, D 39, and D43.* In his written and verbal comments, Dr. Manville made the following assertions:

- The premise that WCFs should not be sited near wetlands is based on the entire history of bird conservation in the US, which arose around waterfowl concentrations at wetlands.
- Of the 1,027 bird species protected, there are 273 species currently designated nationwide as birds of conservation concern (BCCs), the majority of which use wetlands and/or woodlands. Of the 6.8 million birds estimated to die from tower collisions per year in the US and Canada, at least 13 BCC species designated by USFWS as "in decline" but not yet listed pursuant to the Endangered Species Act are estimated suffer 1% to 9% total population loss based solely on tall communication tower collisions, predominately in the eastern and mid-western US (citing a study by Longcore et al, 2013). Dr. Manville urged that BCC species must be considered in permitting the proposed Vail Road tower.
- In review of the instant application, Dr. Manville urged implementation of the "precautionary principle" as endorsed by USFWS, in an effort to avoid or minimize "take" and reduce risk, stating: "Where risk is uncertain, and threats of serious or irreversible damage [could occur, then] lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." *Exhibit D43, page 3.*

- Under the current 2018 USFWS tower siting guidelines, tower proponents should “avoid or minimize take (injury and/or death to birds) as reasonably and as practically possible” by “avoiding wetlands and other known bird concentration areas.” The 2018 guidelines suggested half-mile buffers for nesting hawks and one mile buffers for bald eagles and ferruginous hawks, with no activity within these buffers until chicks have fledged. According to Dr. Manville, the proposed WCF location “ignores” these guidelines by placing the cell tower near wetlands.
- Even short term lighting (such as the proposed timer lighting for worker access after dark) can cause bird attraction and add to bird collision risk. Dr. Manville cited a large bird kill event in 2005 in Pennsylvania, during which he claimed short unguyed towers resulted in significant bird mortality during inclement weather.<sup>11</sup>
- Dr. Manville reviewed a blog and data collected by Dr. Cliff Mass, a University of Washington climatologist, and determined from the data that incidences of fog and heavy rain around Olympia are common, especially during bird breeding seasons. The fog and/or heavy rain visibility issues are especially of concern to Dr. Manville when considering a tower that would stick out above the treeline into airspace known to be used by waterfowl with poor maneuverability and high wing-loading, who during such a weather event may be flying just above tree tops at Vail Road and not see the WCF until course correction is impossible.
- The location of the proposed WCF between the 163rd Lane wetlands and the Smith Ranch wetlands only about 600 feet away, and Lake Lawrence, necessarily endangers the growing waterfowl, waterbird, and shorebird populations accessing the Smith Ranch wetlands, especially considering the possibility of the “perfect storm” collision scenario resulting from a major weather fog event causing mass bird mortality.
- Another “fatal flaw” in the Applicant’s decision to proceed with the Vail Road tower project is the lack of proposed game plan or strategy for performing construction, operation, and maintenance activities in a manner that seeks to avoid direct bird mortality, trauma, egg and chick disturbance and mortality, and nest abandonment.
- According to Dr. Manville, the Trileaf survey was grossly inadequate because it was based only on 12 days of survey sampling during January and April 2017 and because no statistical analyses were performed.
- Specifically regarding the Applicant's avian risk assessment, Dr. Manville noted that Dr. Kerlinger conducted no on-site studies of bird use at Vail Road, nor did he personally assess and statistically evaluate bird risk at the site using any monitoring or assessment tools. The avian risk assessment also failed to address the 2018 USFWS tower siting guidelines.
- Dr. Manville asserted that the Applicant's avian risk assessment and bird survey failed to address bald eagles, which appear to be increasingly common in the area and have likely established nesting territories in the vicinity of the site due to its tall trees. Bald eagles are known to make use of such hazing equipment as the proposed Bird-Be-

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<sup>11</sup> No citation to the source of this anecdotal evidence is provided in the Appellant's materials.

Gone Osprey nest deterrent platform, which could result in eagle strangulation, burns, and death especially to chicks, which could be criminally prosecuted.

- According to Dr. Manville, the existing unknowns suggest the need for a follow-up on-site risk assessment for seasonal, diurnal, and nocturnal bird use ideally performed by an independent consultant with no vested interest in the outcome. Ideally, the site should be required to undergo preconstruction monitoring for at least two years.

Based on the foregoing concerns, Dr. Manville argued that the County should remand the SEPA determination again and require preparation of an environmental impact statement. In preparing for his testimony and written comments, Dr. Manville did not conduct a site visit. *Exhibit D43; Dr. Manville Testimony.*

24. In support of the SEPA appeal, Appellant members of the Deschutes Neighborhood Group testified about their experiences as participants in the Deschutes/Black Hills citizen science study. Many detailed the pre-observation training and the manner in which "lay persons" were matched with more experienced birders from Black Hills Audubon Society. They reported on their personal individual bird counts and species observed - including turkey vulture, bald eagle, red-tailed hawk, golden eagle, trumpeter swans, mallard, Canada goose, belted king fisher, raven, crow, great blue heron, tree swallow, harrier hawk, scaup, pileated woodpecker, merganser, ringneck duck, gadwall, ruddy duck, and a bat - and flight paths observed. All reported that participation in the citizen science survey had been a positive, rewarding experience. *Testimony of Carol Moulton, Carolyn Chew, Erika Fehr, Linda Chiles, Sally Nole, Deena Reeves, Sue Danver, Bob Wadsworth, Rella Schafer, and Diane Dondero.*
25. After issuance of the MDNS, Alex Foster of DNG sent the Deschutes/Black Hills citizen science study to a member of the USFWS Migratory Birds & Habitat Program, Michael Green, who responded on July 27, 2018 with an email carbon copied to the County's SEPA Responsible Official. Mr. Green provided a link to the April 2018 USFWS communications tower siting guidelines, entitled, "Recommended Best Practices for Communication Tower Design, Siting, Construction, Operation, Maintenance, and Decommissioning" (USFWS tower guidelines). The USFWS tower guidelines note that communications towers can cause direct and indirect bird mortality through collisions, direct impacts during construction and maintenance activities, and through significant loss of fat reserves due to energy expended circling towers. The current USFWS guidelines recommend design considerations relating to placement, construction, tower design, lighting, and birds nesting on towers. One of the placement related recommendations is to avoid locating new towers in or near wetlands, flyways, and bird concentration areas (among other placement recommendations). With regard to tower design, the current guidelines recommend that towers be no taller than 199 feet above ground level and be of monopole design free of guy wires, and that Federal Aviation Administration (FAA) and other tower lighting be avoided to the maximum extent possible, as lighting is a primary source of bird aggregation around towers. *Exhibit C6.I.*

26. Specifically addressing the citizen science study and the proposed WCF, in his July 27, 2018 Mr. Green commented as follows:

We encourage all permitting authorities use [the current 2018 USFWS tower guidelines] as part of tower review and when developing permitting conditions. That said, this tower design appears to be optimal from the perspective of reducing the likelihood of bird collisions; that is, the proposed tower is an unguyed monopole, without lights. The equipment on top is bulky and likely quite visible to flying birds in daylight conditions. The single most concerning issue from the perspective of bird collisions is the proximity of the proposed tower to Lawrence Lake, the 163rd Lane wetland, [and] developing wetlands at Smith Ranch. The study provides useful data for evaluating the potential effects of the proposed tower on birds. Not surprisingly, the data show fairly substantial use by waterfowl of the airspace around the proposed tower.

Waterfowl and other water birds drawn to wetlands established for their use are not necessarily the most agile flyers; mid-course corrections are more challenging for larger species. This is why the US Fish and Wildlife Service guidelines recommend that towers not be placed near wetlands. If this tower is built, we encourage monitoring of the site for collisions. Data collected and reported can inform future bird management.

*Exhibit C6.H.*

Applicant's Case

27. In the SEPA appeal, the Applicant argued that the only issue cognizable under SEPA in the Appellants' appeal is whether the proposed WCF would have a probable significant impact on birds; all other issues raised by Appellants in their SEPA Appeal, also raised at the 2016 hearing prior to the remand, are either preempted by federal law or are based on compliance with SUP, WCF, and other zoning standards and thus not properly considered in a SEPA appeal. *Exhibit V26; Charles Maduell Argument.*
28. Addressing the question of probable significant adverse impacts from the proposed WCF, the Applicant offered the testimony and written comments of Paul Kerlinger PhD as an expert on impacts to birds from communication towers. *Exhibit V24 (resume).* The Applicant retained Dr. Kerlinger to conduct the avian risk assessment based on the two site-specific studies (Deschutes/Black Hills and Trileaf) detailed in previous findings. Addressing proposed WCF design and the two site-specific studies, Dr. Kerlinger offered the following assertions:
- Based on a review of literature in the field of avian communication tower collision risk and on the two avian studies done by Deschutes/Black Hills and Trileaf, the short, unguyed, and unlit proposed WCF would not result in significant impacts to birds of any kind. The absence of guy wires and FAA or other lighting, combined with the short tower height, render the proposal consistent with the 2018 USFWS guidelines. Even USFWS Deputy Chief of Migratory Birds & Habitat Program Michael Green stated that the "tower design appears to be optimal from the

perspective of reducing the likelihood of bird collisions” because it is an unguyed, unlit monopole. Dr. Kerlinger points out that Mr. Green did not state that the tower should not be built, nor suggest that the tower would result in significant impacts, but rather he suggested post-construction monitoring to further the scientific knowledge of impacts from unlit, unguyed monopoles.

- Dr. Kerlinger asserted there is no credible evidence that towers the height of the proposed WCF without guy wires and without FAA lighting kill more than approximately one bird per tower per year. Large mass mortality events at towers less than 200 feet in height without guy wires and without FAA or other types of lights have never been documented.
- Dr. Kerlinger asserted that the proposed tower is not in or near wetlands, but rather that the site is located in dense forest, and that as sited, it is consistent with the 2018 USFWS guidelines. He contended - and it is undisputed in the record - that the closest wetland is about 400 feet away from the site and across Vail Road (the 163rd Lane wetland), and that the risk to wetland birds such as ducks and geese from the project as proposed is virtually nil. Wetland and waterfowl have never been demonstrated to be at more than a minor risk from unguyed communication towers.
- Dr. Kerlinger stated that there is not a single report of tower collision fatalities of birds in Washington state, despite the fact that tower companies are obligated to report such fatalities to the State.
- Dr. Kerlinger submitted that the top 40 to 45 feet of the proposed tower that would extend above the tree line is the same as a 45-foot tall, unguyed, unlit tower mounted on the ground.
- Although the citizen science and Trileaf reports revealed waterfowl, raptors, crows, and other birds making regular local flights around and over the local wetlands and some over the tower site, these species are not known to be particularly susceptible to collisions with towers and are rarely killed even by lit, guyed towers of 500 to 1000 feet height.
- In support of his positions, Dr. Kerlinger cited the following studies (among others):
  - Gehring, Kerlinger, Manville (2009), which examined the role of FAA lights at 24 guyed communications towers about 470 feet tall (the Michigan State Police study) for a period of five years; the study revealed that steady burning FAA lights attract and kill more birds than do flashing FAA lights;
  - Kerlinger et al (2012), a study of 18 guyed towers in California, ranging from 163 to 197 feet in height without FAA lights. About half of the towers were in Solano County adjacent to the Suisun Marsh, perhaps the largest waterfowl and waterbird stopover area in the Pacific Flyway. The study found six to seven birds per tower per year were killed by these studies, and none of the fatalities were waterfowl or other waterbirds were killed. This was the first peer reviewed, published tower fatality study in Pacific coast states.



- Kerlinger's wind turbine survey of FAA light studies, the results of which were used by USFWS for their 2012 guidance document for wind turbines, including the results of more than 25 studies in several states considering more than 500 wind turbines, some lit and some not. Kerlinger pointed out that despite these being tall structures, lit with FAA red flashing strobes, there was not a single “perfect storm” type mass mortality event reported, and since that study, no “perfect storm” event relating to wind turbines has been discovered.
- Derby, C., Bird and Bat Fatality Monitoring of Six Un-guyed, Unlit Cellular Telecommunication Towers within the Coconino and Prescott National Forests, Arizona: 2006 Season Results (2006): study reviewed six towers shorter than 200 feet, un-guyed and unlit, in forested lands within the Coconino and Prescott National Forests in New Mexico for three years. These towers extend more than 50 feet above the canopy. The average number of fatalities at these towers was less than one bird per tower per year; in some years, no fatalities were registered at most towers.

*Dr. Paul Kerlinger Testimony; Exhibit V29.*

29. Responding to Dr. Manville's pre-hearing written assertions and arguments, Dr. Kerlinger offered an August 27, 2018 addendum to the avian risk assessment. In his written and verbal comments, Dr. Kerlinger argued the following:
- Despite Manville’s assertions, there has never been a study that demonstrates empirically that towers close to wetlands are riskier to migrating or foraging birds with respect to collision fatalities (or any other impacts). Neither Dr. Manville, nor any of the four versions of the USFWS tower siting guidelines, nor the WDFW comments, nor the Thurston County Code cite any studies that provide evidence for higher tower collision risk near wetlands or wildlife areas. Also interesting is the fact that the largest mortality events and overall fatalities occur at communication towers far from wildlife refuges or wetlands in corn or soy fields in the midwest or in forests in the midwest/southeastern US.
  - Manville and others regularly conflate the impacts of communication towers and electrical transmission lines. Electric transmission lines do pose risks to foraging waterfowl when they cross wetlands and other locations. Transmission lines are analogous to guy wires on taller communication towers, in that they are difficult to see, especially when they cross marshes. Because there are no guy wires on the Vail Road WCF, which is proposed to be placed hundreds of feet from wetlands, there is virtually no risk to foraging waterfowl that may come and go from the marshes.
  - Specifically addressing risk to bald eagles, Dr. Kerlinger noted the WDFW website reports that “the recovery of Bald Eagle (*Haliaeetus leucocephalus*) populations across North America is one of the great species recovery success stories in the United States” and indicates "the number of territories [in Washington] has increased by an average of 28 per year since 2005 when the species was down-listed in the state to Sensitive." At the same time as this significant increase in bald eagle numbers,

there was an unprecedented increase in towers of all sizes in Washington. There no reported bald eagle fatalities caused by towers and no significant disturbance to eagles in Washington, and no known collision fatalities of bald eagles at communication towers anywhere in North America.

- Dr. Kerlinger argued that Dr. Manville did not provide any substantiation, in the form of a citation from a journal or other published source, that demonstrates there is a risk from a tower that stands up 40 to 50 above the tree canopy.
- Dr. Manville had argued that the Applicant's avian risk assessment fails to cite any studies of similar towers to that proposed - that all the cited studies were of taller towers, many guyed, many lit. Dr. Kerlinger responded to this argument by noting that there are very few studies about short, unguyed, unlit towers because they are not a known threat for bird collisions, but again, he pointed out his 18-tower study from California.
- Dr. Kerlinger contended that in citing the Longcore et al study (2012), Dr. Manville failed to call out the most salient factor: the study determined it was the FAA lighting that caused birds to circle towers in inclement weather, leading to depletion of fat reserves, collisions, and death. Again, the proposed WCF would not be lit. Dr. Kerlinger reiterated that all studies reporting mass fatality events have been at towers with lights and guy wires.

*Dr. Paul Kerlinger Testimony; Exhibits V23 and V29.*

#### *County Case*

30. After the 2016 remand on Appellants' appeal of the County's original 2015 SEPA determination of non-significance (DNS), the Applicant and the Appellant submitted the two site-specific bird surveys detailed previously (the Deschutes/Black Hills citizen science and Trileaf studies). Upon review of the two studies, Planning Staff requested peer review of both from an Applicant consultant, and accepted Dr. Kerlinger's avian risk assessment in satisfaction of that requirement. After reviewing the three bird studies, Planning Staff determined that the remand decision's requirement for additional site-specific bird study had been met. The studies were routed to WDFW for comment. Based on agency comment and peer review, Planning Staff determined that, with the imposition of the mitigation measures spelled out in the MDNS, the proposed WCF, shorter than 200 feet, unguyed, and unlit, would not result in probable, significant adverse environmental impacts. *Exhibits C6, C6.C, C6.D, C6.E, and C6.F.*
31. After receiving the appeal, Planning Staff was cc'd on Michael Green's email from the USFWS in response to the Appellants' site-specific bird study. Mr. Green's email included the 2018 USFWS tower siting guidelines. Reviewing both the 2018 guidelines and Mr. Green's comments, Planning Staff determined that the proposed WCF complies with all USFWS guidelines except for the recommended best practice stating, "towers should not be sited in or near wetlands". Staff pointed out that the 2018 USFWS guidelines do not establish a specific buffer or setback from wetlands or bird migratory routes. Staff adopted Mr. Green's suggestion for post-construction monitoring as a

recommended condition of the WCF special use permit. *Exhibit C6; Tony Kantas Testimony.*

32. Planning Staff submitted that the mitigation measures imposed in the May 3, 2018 MDNS, required compliance with WCF development standards of TCC Chapter 20.33, and the proposed height and design of the unlit, unguyed WCF constructed within a forested portion of the property would act in coordination to adequately mitigate adverse impacts on bird species. Staff noted that TCC 20.33.080(2)(e)(i) does not prohibit WCFs within 1,000 feet of a wetland, but rather prohibits such placement if the Applicant cannot show that placement within 1,000 feet of wetlands would not impact birds. Planning Staff noted that compliance with TCC 20.33.080(2)(e)(i) and all WCF-specific provisions of the County Code are not SEPA issues. Similarly, the question of whether Smith Ranch should be considered a wildlife refuge is not a SEPA issue, but rather only relevant under review of zoning WCF standards. With regard to the SEPA standard, after reviewing the two site specific studies, the peer review avian risk assessment, the 2018 USFWS tower siting guidelines, and comments from Michael Green, Planning Staff remains satisfied that the Applicant has shown that the proposal would not result in unmitigated probable significant adverse environmental impacts. No testimony or other evidence offered by the Appellants during the SEPA appeal hearing caused Planning Staff to change its position. *Exhibit C6; Tony Kantas Testimony.*

#### Special Use Permit Findings

33. The proposal meets the definition of an unstaffed wireless communication facility/antenna support structure as defined at TCC 20.03.040(146.1). The Long-Term Agriculture (LTA) zone permits free standing WCFs and support equipment as a special use. *TCC 20.08A.025; TCC 20.54, Table 1.* Pursuant to TCC 20.33.080(2)(a), WCFs are prohibited in residential zones unless there is no alternative; the LTA zone is not considered a residential zone. *Exhibit C1.*
34. The County's WCF regulations require that new proposed wireless communication facilities co-locate on an existing antenna support structure, if possible. *TCC 20.33.070.* Information submitted by the Applicant shows the nearest existing tower is more than 3.5 miles from the site and would therefore not be able to provide the desired coverage. *Exhibit C1.DD.*
35. Planning Staff submitted that, as conditioned, the proposal would comply with all zoning district regulations. No open space dedication is required; however, Staff recommended a condition of approval requiring a 50-foot wide treed buffer surrounding the WCF in perpetuity. Pursuant to TCC 20.33.080(6)(b), the maximum height for a freestanding cellular tower is 180 feet including antennae. The proposed 156-foot tower is within the allowed height limit and is exempt from the 35-foot building height limit within the LTA (TCC 20.08A.040(2)). *Exhibit C1.*

36. Addressing the requirement established in TCC 20.33.080.1 to evaluate alternative sites, the Applicant indicated that: there are no collocation opportunities on existing communication support structures in the area that could bring cell service to the area; that the proposed site meets Verizon's coverage area objectives; the site is not in a residential zone; and the existing on-site screening afforded by the forested condition of the parcel render it a preferred site. *Exhibits C1.I and C1.J; Sarah Telschow Testimony*. There are no commercial or industrial zoned properties in this rural area of Thurston County that could serve as an alternate location. The Applicant provided documentation justifying the need for a facility in this area to provide wireless coverage to their customers. *Exhibit C1.DD and VI4*. Much of the public comment on the application urged approval so area residents could have reliable cellular service. *Exhibits C1.WW, C1.XX, C1.YY, C5, and C8; Testimony of Harry Miller, Kiersten Slevin, Bob Hastings, Riley Slevin, and Cheryl Lynn Love*.
37. As part of the application packet, the Applicant submitted the required power density calculations and other information showing the facility would comply with applicable Federal Communications Commission (FCC) requirements. *Exhibit C1.EE*. Planning Staff had this information reviewed by a third party reviewer to confirm compliance with FCC guidelines and standards, consistent with TCC 20.33.060. The third party reviewer submitted a letter confirming that the proposal would comply with FCC requirements. *Exhibit C1.CC*.
38. Due to the subject property's location in the rural portion of Thurston County, the minimum required separation from other antenna support structures is 2,400 feet. The nearest antenna support structure is approximately 3.5 miles from this facility, well exceeding the minimum separation standard. Pursuant to TCC 20.33.080.3(a), the minimum setback required from property lines is 110% of the height of the tower including antennas. At 156 feet in height (with antennas), the minimum required setback from property lines is 172 feet. The proposed tower would be set back 172 feet from the nearest property line (north/west), and further from all other parcel boundaries. *Exhibits C1, C1.I, and C1.J*.
39. The Applicant submitted, and Planning Staff concurred, that the proposed telecommunication facility has been located, designed, and screened to blend with the immediate surroundings to reduce visual impacts. The monopole and antennas would be painted a dark green color (Sherwin Williams Rock Garden – SW6195, Exhibit C1.MM) and located within a stand of existing trees to screen and camouflage the facility from view. Consistent with the County's WCF siting provisions, the Applicant commissioned balloon photo tests at the height of the proposed tower taken from various vantage points on area roads and parcels. The resulting photographs were used as the source for photosimulations depicting the appearance of the proposed facility from those same locations. The base of the proposed WCF and supporting equipment structures, as well as the majority of the monopole would be screened from off-site views by the existing trees on the underlying property, required to be retained in perpetuity within a 50-foot buffer surrounding the site. A review of the balloon test and photosimulations confirms

that the top of the WCF, including antennas, would be visible from adjacent properties and nearby public roadways; however, they also show that the tower would not negatively impact significant views. *Exhibit C1.Z*. From Vail Road, Mt. Rainier is visible to the northeast. *Exhibit D30, pages 8 and 9*. However, the antennas and top of the tower would be located among trees to the left of visible Mt. Rainier, not in direct line of sight with the mountain, and to the extent it would be visible, it would be seen among the tree tops. *Exhibit C1.Z, View #2*.<sup>12</sup>

40. The proposed ground equipment would be located within a fenced enclosure placed to meet all zoning and WCF setback requirements. Ground equipment would not be taller 10 feet and would not be visible from adjacent properties or public rights-of-way. The proposal does not include storage of motor vehicles or materials associated with the WCF/antenna support structure of the fenced ground equipment enclosure. The proposed facility is on private property and not in a location where the general public would be permitted. The proposed ground equipment and tower base would be enclosed by a six-foot high chain link fence fitted with green slats topped with three strands of barbwire. The tower would feature anti-climbing devices. *Exhibits C1, C1.I, and C1.J*.
41. The application materials included a professionally prepared noise report analyzing the compliance of projected noise levels from the equipment cabinets and generator with County noise standards. Proposed noise generating equipment includes ground mounted support cabinets with interior fans and generator. The equipment cabinets would operate 24 hours per day, while the generator would only operate during emergencies and once a week for a few minutes for maintenance purposes. Because surrounding properties are rated as Class A (most sensitive) sound receivers, the maximum daytime sound level is 60 decibels and the maximum nighttime sound level is 50 decibels. Considering the specifications of the devices proposed and distance to property lines, the equipment cabinets are expected to generate a sound volume of 40 decibels at property boundaries, and the generator, to be placed inside a sound enclosure, is projected to generate 39 decibels at property lines. The sound study shows the project would comply with County noise standards. *Exhibits C1 and C1.AA*.
42. The application materials included information indicating that the proposed monopole does not require any safety lighting for air traffic signaling consistent with Federal Aviation Administration requirements. The ground equipment area would contain work safety lights be engaged only during night technician visits' the lights are proposed to be

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<sup>12</sup> In their SEPA appeal materials, Appellants attempted to argue that the balloon/photosimulations were inaccurate and failed to reveal impacts to views of Mt. Rainier. However, a comparison of the Appellants' photos (*Exhibit D30, pages 8 and 9*) with the Applicant photos they challenge (*D30, page 10*) makes clear that the photos were taken from approximately the same vantage point on Vail Road, and the photosimulation shows that the top of the WCF structure would be among trees. The fact that the Applicant's photos from this location omit visible Mt. Rainier to the right can likely be explained by the cloud layer shown in the Applicant photos as having been present that day; but comparing the photos, it is clear that even if visible, the WCF would not obstruct or interfere with views of Mt. Rainier from this location because the stand of trees is to the left of the mountain.

on a timer and would automatically turn off within a set time after a technician leaves the site. *Exhibits C1.I, C1.FF and C1.HH.*

43. The Applicant submitted a market study addressing what impact, if any, the project would have on residential property values. The study concludes that the proposed tower would have no discernible impact on single-family home values in the area. *Exhibit C1.RR.*
44. The potential for impacts to wildlife, especially birds, was a concern raised by WDFW during that agency's 2016 review of the proposal. Bird impacts have been thoroughly discussed in the SEPA appeal findings above. Note that no party (state or federal agency, Appellants, or members of the public) raised significant concerns about species aside from birds. One bird issue not fully discussed above was a WDFW concern that osprey are highly attracted to cell towers and often forgo a natural nest location to nest on a tower. To avoid this, WDFW recommended placing hazing structures on the cell tower. *Exhibit C1.S.* Planning Staff recommended a condition of approval that would require the Applicant to install hazing structures on the top of the tower. *Exhibit C1.* The Applicant's proposed anti-nesting device is called Bird-B-Gone. *Exhibit C1.EEE.* The primary (possibly only) concern about the proposed Bird-B-Gone hazing structure raised in comment on the proposal, aside from its additional height, was Dr. Manville's concern that bald eagles might use the hazing structure to build a nest. (See Appellants' SEPA appeal findings above). Regarding other critical areas issues, the project would be located outside of all applicable wetland, stream, and shoreline buffers required pursuant to the County's critical areas ordinance and shoreline master program. *Exhibit C1, C1.F, and C1.G.*
45. The Environmental Health Section of the Public Health and Social Services Department reviewed the project for compliance with health codes and recommended approval subject to conditions. Recommended health conditions addressed maintenance and operation of the proposed emergency generator, storage and handling of its fuel, and storage and handling of batteries and lubricants as potentially hazardous materials. *Exhibit C1.R.*
46. The Development Review Services Section of the Public Works Department reviewed the project for access and storm water control requirements and recommended approval with conditions. Public Works' recommended conditions addressed extension of utilities to the site, stormwater runoff management, and other potential impacts to the County right-of-way from which the subject property takes access. *Exhibit C1.Q.*
47. In addition to comments offered on review of the project's compliance with SEPA, the Washington State Department of Ecology submitted comments providing information regarding the management of toxics cleanup, should contaminated soils be discovered during site development. *Exhibits C1.T and C1.U.*

48. The Nisqually Indian Tribe submitted a comment letter indicating that it had no concerns about the proposal, but the Tribe did ask to be informed of inadvertent discoveries of cultural resources during site development. *Exhibit C1.V.*
49. Although raised in the SEPA appeal by Appellants when not properly included within the scope of a SEPA appeal, Planning Staff responded to Appellants' allegations with respect to the inadequacies of the SUP application for the purpose of completing the record. The primary contention of the Appellants was that the project is not consistent with the requirements of TCC 20.33.080(2)(e)(i) because it is proposed to be placed within 1,000 feet of multiple wetlands, a publicly owned wild life refuge, and/or a flyway of priority bird species. This provision of the code states:

To minimize the potential for birds to collide with towers, WCFs/antenna support structures shall not be located within one thousand feet of wetlands, staging areas, or rookeries supporting birds listed as priority species by the Washington Department of Fish and Wildlife, listed as endangered or threatened species under the federal Endangered Species Act (64 FR 14307), listed in Title 24 TCC or Chapter 17.15 TCC as species of local importance, and as amended, or within one thousand feet of publicly owned wildlife refuges, unless the applicant demonstrates that the proposed location will not have a significant impact on such birds. Where possible, WCFs/antenna support structures shall not be located where they would interfere with migratory flyways documented by state or federal agencies.

The record includes two site-specific bird surveys that confirm that the wetlands around the site support multiple birds listed as priority species by WDFW and that the airspace surrounding the proposed tower site functions as a minor flyway for listed and unlisted bird species. However, the Applicant also submitted an avian risk assessment in which an expert on bird collisions with communication towers opined that the risk of bird collision with the 156-foot tall, unlit, unguyed monopole surrounded by trees is low and that not more than one bird per year would be expected to die from tower collision. Planning Staff accepted the avian risk assessment as evidence that the WCF in the proposed location would not have a significant impact on birds. *Exhibits C6, C6.D, C6.E, and C6.F; Tony Kantas Testimony.*

50. Staff responded to other Appellant arguments about the SUP application's compliance with the County Code's WCF provisions as follows:
- Regarding assertions that the application should be considered incomplete for alleged failure to identify all critical areas within the vicinity of the site, Planning Staff noted that the Applicant provided maps and analysis of all nearby critical areas with the SUP application and further maps, studies, and surveys of the bird migratory routes from the near-by wetlands and other near-by habitats in response to the remand. *Exhibits C1.F, C1.G, C1.H, C1.PP, C1.QQ, C6.D, and C6.F.* The County determined

- that sufficient information regarding the surrounding critical areas was submitted to review the proposal.
- Regarding the allegation that the project does not have a valid property owner affidavit per TCC 20.33.050.1(a) and 1(b), Planning Staff acknowledged that the property owner who owned the property at the time of application submittal recently passed away. Staff recommended a condition of SUP approval that would require the Applicant to submit an updated owner affidavit if the SUP is approved. *Exhibits C1.B, C1.II, and C6.*
  - Regarding the assertion that the SUP permit should be considered expired, Planning Staff submitted that the SUP application remained "in review" as a result of the remand for additional SEPA review, requiring further bird surveys that needed to be completed during a particular time of the year, and that both the land use and SEPA applications were on hold during the remand timeframe. The project's building permit applications expired. Planning Staff submitted that if the SUP is approved, the Applicant would be required to reapply for building permit approval and re-pay the submittal fees. *Exhibit C6.*
  - Appellant's contentions about the inadequacy of the Applicant's balloon test photos are partially addressed in finding 39 above; however, Appellants also contended that the balloon study was not performed at the actual proposed height of the tower plus any required osprey hazing structure, which they alleged was required by the WCF provisions. The Applicant's balloon test was noticed to all surrounding property owners within 2,600 feet of the site as proposing a 150-foot tall monopole, with photos to be taken from 22 vantage points that were pre-reviewed and accepted by Planning Staff. Planning Staff submitted that the Applicant's balloon test satisfied the requirement of TCC 20.33.050.3. Of note, of the 22 vantage points approved, the balloon was visible from only three. Staff noted that the tower and antennas would be painted a dark green color and would blend in with the surrounding evergreen trees. *Exhibits C1.X, C1.Y, C1.Z, and C6.*
  - Regarding assertions that the Applicant had not provided any quantifiable data to demonstrate a coverage gap that would justify construction of a new WCF, that less intrusive alternatives to construction of the WCF already exist in the form of residential network extenders/signal boosters, and that there is already adequate wireless phone service in the area, Planning Staff noted that the Applicant submitted the required RF justification letter, which was accepted by Planning Staff as depicting a coverage gap in Verizon service around Lake Lawrence. Staff noted in testimony that much of the public comment received in both 2016 and 2018 supported the Applicant's assertion that there is poor cellular service and that better service is needed in the vicinity for emergency response capability. Staff submitted the position that the WCF provisions in TCC Chapter 20.33 do not allow construction of new WCFs only in cases where signal extenders are inadequate, or only in cases where there is no coverage by other providers. *Exhibits C1, C1.DD, and C6; Tony Kantas Testimony.*



51. Public comment offered at the 2016 hearing, both written and verbal, expressing the following (paraphrased) concerns about the proposal:

Health impacts: Many were concerned with potential health impacts referencing various news articles and studies. One individual whose residence is near to the proposed tower location testified that she has a permanently implanted medical device, the operation of which could experience EMF-related interference, which could impact her health significantly if a WCF is approved so near her residence.

Neighborhood character/Property Value Impacts: Many stated that they live in the area expressly for the enjoyment of a rural quiet neighborhood with an abundance of nature and wildlife. Others asserted their property values would be negatively impacted. One real estate broker testified that it is proven that buyers avoid homes that are near wireless communication facilities.

Impacts to views: Evidence was offered by project opponents challenging the adequacy of the Applicant's visual assessment evidence and contending that the project would result in a WCF that would not comply with TCC 20.33.080(2)(b)(i) and (ii). Some comment asserted that the proposed WCF would impede views of Mount Rainier and that the Applicant failed to demonstrate, through balloon tests at alternate sites, that a less view impacting site is not available. Several people who commented stated that viewing the WCF would negatively impact the rural character of the area.

Impacts to wildlife, critical areas, and properties: Several people testified that they are concerned for environmental effects to the wetland areas and harmful effects to wildlife. A beekeeper and another person testified to the potential harm to bees noting studies have shown that navigation patterns of bees are affected by electromagnetic fields (EMF). The beekeeper testified that his livelihood would be negatively impacted.

Support for WCF: Many individuals also wrote or testified in support of the facility citing a need for improved cellular coverage, particularly for security and to facilitate prompt emergency response for those with health conditions or more advanced years.

*Testimony of Inge Piller, Edson Holloway, Wayne Vanderpol, Burgess Meredith, James Pfaff, Gerard Moore, Diane Dondero, Richard Krueger, Dr. Eva Lester, Dillard Jensen, Adrienne Arias, Chantal LaFont, Lyn Quayle, Marian Clements, Thomas Mani, Ann Kennedy, Christy White, Sue Danver, Jean Marie Mason, Bo Foster, Debra Nimocks, Jason Nimocks, Terry Kram, Wally Brown, Judy Chapman, Dan Page, Judy Andrew, Rella Schafer, Alison Baker, Carolyn Chew, Chris Nubbe, and Deena Reeves; Exhibits C1.WW, C1.XX, C1.YY, D10, and D22.*

52. In the 2018 public hearing process on the special use permit, members of the public expressed the following (paraphrased) concerns:

Many expressed concerns relating to health effects to people and wildlife. The biggest health concern for people is brain cancer. Some comments included

attached literature attributing radiation from cell towers as a cause for cancer. Others raised concern about impacts to wildlife with an emphasis on impacts to bird migration. Members of the Audubon Society provided flight observation data for months January through April 2017 noting hundreds of sightings each month of a variety of species. It was asserted that the Smith Ranch Mitigation area is a public area with the sole purpose of wildlife and habitat mitigation for the Deschutes River Basin whose restoration is required to allow for joint acquisition of water rights and land by the cities of Olympia, Lacey, and Yelm.

Some contended there would be negative impact to the rural character and to aesthetics. Some argued there is adequate cell coverage and that other communication methods are available. One member of the public noted that the Applicant's website reflects full coverage in the area and questioned the authenticity of the marketing.

*Testimony of Dr. John Ruhland, Christine Hartman, Alan James Hultengren, Mary Abramson, Carol Moulton, Jeanne Jarecki, Sue Danver, Steven Knopp, Carolyn Chew, and Diane Dondero; Exhibits C8 and C9.*

53. There was also support for the SUP at the 2018 public hearing, with members of the public submitting the following (paraphrased, consolidated) issues for consideration verbally and in written comments:

The majority of comments in support centered around public benefit and safety, particularly in emergency situations and the need for improved connection/services. A number stated current services are intermittent or non-existent. Several provided specific instances of serious accidents in which emergency personnel was unable to be contacted or impeded by the lack of cell coverage. A couple of individuals noted personal experiences of walking for emergency assistance due to lack of services. The Lake Lawrence Community Citizens group submitted a petition in support with 250 residents signing the petition.

*Testimony of Harry Miller, Kiersten Slevin, Bob Hastings, Riley Slevin, and Cheryl Lynn Love; Exhibits C8 and C9.*

54. Dr. Albert Manville confirmed there are currently no recommended safety standards for wildlife regarding WCF radiation. *Exhibit D34, page 3*. Specifically with regard to human health effects of WCFs, Section 332(c)(7) of the Federal Telecommunications Act of 1996 preempts local decisions premised directly or indirectly on the environmental effects of radio frequency (RF) emissions, assuming that the provider is in compliance with the federal RF rules. The Applicant submitted required power density calculations and other information effectively demonstrating compliance with FCC requirements. County Staff had this information reviewed by a third party reviewer to confirm compliance with FCC guidelines, consistent with TCC 20.33.060. The County's third party reviewer confirmed that the proposal was capable of complying with FCC requirements. *Exhibits C1, C1.CC, C1.DD, and C1.EE*. Because of this compliance, all

issues raised with regard to environmental health in both the SEPA appeal materials and in public comment are outside the scope of the authority of any local land use decision maker.

55. At the conclusion of public comment, Planning Staff remained of the opinion that the submitted materials demonstrate compliance with the approval criteria for special use permit and for wireless communication facilities and recommended approval subject to conditions. The recommended conditions require (among other items): construction of tower height (excluding hazing device) to 156 feet at top of antenna; setbacks of at least 110% of tower height from property lines; noise control to remain compliant with the County noise ordinance; enclosure of tower base and ground equipment within a six-foot chain link fence; anti-climbing devices; no FAA or other hazard lighting; a minimum 50-foot tree retention buffer around the equipment enclosure to include replacement of any tree that dies within the buffer; updated property owner affidavits; ground equipment not taller than ten feet; emergency contact information on the fence; compliance with TCC Chapter 20.33; landscaping installation consistent with the approved site plan; painting the tower dark green as proposed; compliance with all mitigation required in the May 3, 2018 MDNS; and that state or federal agency personnel interested in studying the facility's impact on birds must be allowed into the facility by the Applicant. *Exhibit C6; Tony Kantas Testimony.*

## CONCLUSIONS

### Jurisdiction

The Hearing Examiner has jurisdiction to decide this special use permit application pursuant to TCC 2.06.010 and 20.54.015. The Examiner is authorized to decide appeals of environmental threshold determinations made pursuant to the State Environmental Policy Act pursuant to TCC 2.06.010(E) and TCC 17.09.160(A).

### Criteria and Standards for Review

#### ***SEPA Appeal***

The State Environmental Policy Act (Chapter 43.21C RCW or “SEPA”) specifies the environmental review procedures the County must follow for proposals that may have an impact on the environment. *RCW 43.21C.030(b)*. The SEPA threshold determination is a determination as to whether a proposal is “likely to have a probable significant adverse environmental impact.” *WAC 197-11-330*. Pursuant to *WAC 197-11-330(3)*, in determining an impact's significance the responsible official must take into account the following (among other considerations): that the same proposal may have a significant adverse impact in one location but not in another location; that several marginal impacts when considered together may result in a significant adverse impact; and whether a proposal may to a significant degree:

- (i) Adversely affect environmentally sensitive or special areas, such as loss or destruction of historic, scientific, and cultural resources, parks, prime farmlands, wetlands, wild and scenic rivers, or wilderness;

- (ii) Adversely affect endangered or threatened species or their habitat; [and/or]
- (iii) Conflict with local, state, or federal laws or requirements for the protection of the environment; ....

The lead agency must make its threshold determination “based upon information reasonably sufficient to evaluate the environmental impact of a proposal.” *WAC 197-11-335*.

For an environmental threshold determination to survive judicial scrutiny, the record must demonstrate that "environmental factors were adequately considered in a manner sufficient to establish prima facie compliance with SEPA," and that the decision to issue a MDNS was based on information sufficient to evaluate the proposal's environmental impact. *Pease Hill Community Group v. County of Spokane*, 62 Wash.App. 800, 810 (1991).

Clear error is the standard of review applicable to substantive decisions under SEPA. *Cougar Mt. Assocs. v. King County*, 111 Wn.2d 742, 747, (1988). The determination by the governmental agency is clearly erroneous only if the reviewing tribunal is left with “the definite and firm conviction that a mistake has been committed.” *Id.* at 747 (quoting *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 69, (1978)). The burden of proof is on the Appellant to show that the proposal will have probable, significant adverse environmental impacts. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, (2002).

The procedural determination of the County's Responsible Official shall be accorded substantial weight in appeals. *TCC 17.09.160.I.2; TCC 17.09.160.S; RCW 43.21C.075(3)(d); RCW 43.21C.090*.

### ***Special Use Permit Criteria for Review***

The Hearing Examiner may approve an application for a Special Use Permit only if the following general standards set forth in TCC 20.54.040 are satisfied:

- A. Plans, Regulations, Laws. The proposed use at the specified location shall comply with the Thurston County Comprehensive Plan, and all applicable federal, state, regional, and Thurston County laws or plans.
- B. Underlying Zoning District. The proposed use shall comply with the general purposes and intent of the applicable zoning district regulations and subarea plans. Open space, lot, setback and bulk requirements shall be no less than that specified for the zoning district in which the proposed use is located unless specifically provided otherwise in this chapter.
- C. Location. No application for a special use shall be approved unless a specific finding is made that the proposed special use is appropriate in the location for which it is proposed. This finding shall be based on the following criteria:
  - 1. Impact. The proposed use shall not result in substantial or undue adverse effects on adjacent property, neighborhood character, natural environment, traffic conditions, parking, public property or facilities, or other matters affecting the public health, safety and welfare. However, if the proposed use is a public facility or utility deemed to be of overriding public benefit, and if measures are

taken and conditions imposed to mitigate adverse effects to the extent reasonably possible, the permit may be granted even though said adverse effects may occur.

2. Services. The use will be adequately served by and will not impose an undue burden on any of the improvements, facilities, utilities, or services existing or planned to serve the area.

### **Wireless Communications Facilities Standards**

Pursuant to 20.33.080, the following standards apply to freestanding WCFs and remote freestanding WCFs/antenna support structures.

1. Evaluation of Alternative Sites. Prior to submission of an application for a WCF/antenna support structure, the Applicant is encouraged to meet with residents of the search area for the proposed WCF/antenna support structure for the purpose of evaluating alternative sites and exploring the possibility that other technically feasible sites may be available that would be more acceptable to the community.
2. Siting.
  - a. Freestanding WCFs and other antenna support structures regulated by this chapter shall not be permitted in residential districts unless ...(not applicable);
  - b. WCFs and other antenna support structures shall be located, designed and screened, to the extent feasible, to blend with the immediate surroundings so as to reduce visual impacts.
    - i. Proposed WCFs/antenna support structures shall be located where their visual impact is least detrimental to views of recognized landmarks, such as, but not limited to, Puget Sound, Nisqually Valley, Mount Rainer, the Black Hills, and the Olympic Mountains. If the approval authority determines that the proposed location for the facility would have a significant detrimental impact on a view of a recognized landmark, she/he shall deny the proposal unless the applicant demonstrates that a less impacting site is not available.
    - ii. In order to demonstrate that a less impacting site is not available, applicants for WCF/antenna support structures impacting the views listed in subsection (2)(b)(i) of this section shall identify all viable alternative sites available for accommodating the WCF/antenna support structure. The applicant shall perform balloon tests for the proposed and alternative sites, in a manner consistent with Section(3), and submit them for approval authority review.
    - iii. WCFs/antenna support structures shall be sited off ridgelines unless they are designed to blend in with the surrounding environment in such a manner that they would not have a significant visual impact, as determined by the approval authority, or the applicant demonstrates that no alternative location is available.
    - iv. In determining whether or not a WCF/antenna support structure will have a significant adverse visual impact on a view/location listed in subsections

(2)(b)(i) and (2)(b)(iii) of this section, the approval authority shall at least consider the following:

- (a) The degree to which the antenna support structure is screened by topographic features from the views listed in subsection (2)(b)(i) of this section;
  - (b) Whether trees and vegetation can be preserved in a manner that would substantially limit the visibility of the proposed WCF/antenna support structure from the views listed in subsection (2)(b)(i) of this section;
  - (c) Whether background features in the line of sight to the proposed WCF/antenna support structure would obscure it or make it more conspicuous;
  - (d) Whether the proposed design would reduce the silhouette of the portion of the WCF/antenna support structure extending above surrounding trees, landforms, or structures; and
  - (e) Whether the facility has a camouflage design.
- v. Applicants proposing uncamouflaged WCFs/antenna support structures in locations that cannot be at least partially screened by existing trees, topography, or structures must submit documentation as to why sites which would provide screening potential are not available or technically feasible to provide adequate service. The approval authority shall deny applications for WCFs/antenna support structures in open areas (including, but not limited to, fields, prairies, or lawns without trees at least one-half of the height of the proposed antenna support structure) where they would be visible from abutting public roads, public recreational areas, or residences unless the applicant demonstrates that a less visually impacting site is not available to provide service.
- vi. Unless effectively camouflaged, as determined by the approval authority, WCFs/antenna support structures shall be located on a site to take maximum advantage of the screening afforded by any existing trees, topography, and structures in order to minimize their visibility from the surrounding area, consistent with other applicable regulations. Priority shall be given (in descending order) to minimizing visibility from existing dwellings, public rights-of-way, and public parks and open spaces.
- vii. In residential and commercial districts, flush mounted antennas shall be used unless the applicant demonstrates that another mount is necessary.
- c. WCFs and other antenna support structures shall be located so they do not narrow the sidewalk width ... (not applicable)...
- d. WCFs and other antenna support structures shall be located, designed, and screened to maintain property values and neighborhood character.

- e. WCFs and other antenna support structures shall be sited consistent with the provisions of the Thurston County Agricultural Uses and Lands Critical Areas Ordinance (Chapter 17.15 TCC), the Thurston County Critical Areas Ordinance (Title 24)...;
- i. To minimize the potential for birds to collide with towers, WCFs/antenna support structures shall not be located within one thousand feet of wetlands, staging areas, or rookeries supporting birds listed as priority species by the Washington Department of Fish and Wildlife, listed as endangered or threatened species under the federal Endangered Species Act (64 FR 14307), listed in Title 24 TCC or Chapter 17.15 TCC as species of local importance, and as amended, or within one thousand feet of publicly owned wildlife refuges, unless the applicant demonstrates that the proposed location will not have a significant impact on such birds. Where possible, WCFs/antenna support structures shall not be located where they would interfere with migratory flyways documented by state or federal agencies.

## **Conclusions Based on Findings**

### **A. SEPA Appeal**

In order to prevail, SEPA Appellants must prove that the MDNS was clearly erroneous in the face of the deference due to the SEPA Responsible Official's determination. *TCC 17.09.160.I.2; Cougar Mt. Assocs. v. King County*, 111 Wn.2d 742, 747, (1988). Washington courts have held that a determination of non-significance must be upheld if the record demonstrates that "environmental factors were adequately considered ... and that the decision... was based on information sufficient to evaluate the proposal's environmental impacts." *Anderson v. Pierce County*, 86 Wn. App. 290 (1997).

Speculative allegations, unsupported by reference to evidence, do not meet the Appellants' burden of proof. *E.g., United Development Corp. v. City of Mill Creek*, 106 Wn. App. 681, 696 (2001); *Anderson v. Pierce County*, 86 Wn. App. 290, 305 (1997). The responsible official need not consider impacts that are merely possible, speculative, or remote, only those that are probable. *Indian Trail Property Owner's Ass'n v. City of Spokane*, 76 Wn. App. 430, 441 (1994).

In the SEPA context, "[p]robable means likely or reasonably likely to occur, as in 'a reasonable probability of more than a moderate effect on the quality of the environment[.]'" Notably, the term "[p]robable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative." *Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 151 (2001). The burden is on Appellants to demonstrate that the responsible official failed to consider probable, significant adverse environmental impacts. *Indian Trail Property Owner's Ass'n*, 76 Wn. App at 441.

In the 2016 SEPA appeal hearing, the Appellants submitted undisputed information provided by a wetland scientist who works for a federal agency (Alex Foster), based on first hand observations, that the 163<sup>rd</sup> Lane wetland is used by eight WDFW priority species and hosts two federally listed endangered species. The 2016 Remand decision concluded that

"Even without considering the adjacent Smith Ranch project and whether what WDFW biologists consider to be a flyway is the "migratory flyway" contemplated in the WCF siting criteria (the term is not defined in code), the proposed WCF placement would conflict with TCC 20.33.080(2)(e)(i) unless the Applicant can show that the proposed location will not have a significant impact on birds. The Applicant has asserted that there will be no significant impact on birds but in the record presented, has not shown this."

On remand, the SEPA Responsible Official considered two site-specific studies, one of which was prepared by members of the Appellant group, which were both peer reviewed by a national expert in bird tower collisions. The site-specific studies show the 163rd Lane wetland and the wetlands being developed at Smith Ranch are used by waterfowl and other birds that fly between the two areas, occasionally using airspace around and over the proposed WCF site. Even considering the presence of federally and state listed priority bird species, and even considering waterfowl presence between the two wetland areas, the avian risk assessment concluded that the risk of bird collision with the proposed WCF would not be significant, likely to be as low as one or zero birds per year. The Deschutes/Black Hills citizen science study was sent to USFWS for review. That agency specifically commented that the tower design is optimal with regard to reducing the chances for bird collision. While noting that the proposed WCF site is "near wetlands", the USFWS Deputy Chief of the Migratory Birds & Habitat Program, stated that if the tower is built, there should be post-construction monitoring and that the data collected could inform future bird management. The avian risk assessment peer review was submitted for review and comment to WDFW, and the same state biologist whose concerns played a central role in the 2016 remand stated that the avian risk assessment "is a thorough review of cell tower and wildlife interaction and I conclude with much of the content. ... [While] the proposed tower location is within 1,000 feet of two waterfowl concentration areas (163rd wetlands, Smith Ranch Mitigation Area) [and] this placement does put wildlife at more risk ... [h]owever, I think the applicant has adequately analyzed that risk and I concur with the conclusion that the risk of bird strikes exists but is low due to the height and design of the tower."

In the testimony offered by the Appellants' expert, Dr. Manville was unable to cite a single study that has concluded that short, unlit, unguyed towers pose a significant collision risk to any species of bird, nor any studies that show increased risk of bird collision with an unlit, unguyed tower that stands 45 feet above a surrounding tree canopy, nor any studies that show placement of a WCF within 430 feet of a wetland empirically increases risk of bird collision fatalities.



The undersigned is convinced that the SEPA Responsible Official reviewed sufficient evidence to reach the environmental threshold determination. Considering the evidence as a whole, in the record on remand the Appellant has failed to show probable, significant adverse risk to birds or any other element of the environment. Appellant witness testimony raises concerns that are best characterized, for the purpose of SEPA review, as speculative. Especially in light of the deference owed to the SEPA Responsible Official, the appeal must be denied.

*Findings 1, 4, 5, 7, 8, 12, 13, 14, 15, 16, 17, 18, 20, 22, 23, 24, 25, 26, 28, 29, 30, 31, and 32.*

## **B. Special Use Permit**

1. As conditioned, the wireless communication facility would comply with applicable provisions of the County Comprehensive Plan and all applicable provisions of the FCC and County Code. *Findings 1, 2, 6, 7, 8, 12, 13, 14, 15, 16, 17, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, 46, 49, 50, 51, 52, and 53.*
2. The WCF is allowed in the LTA zone subject to SUP approval. No open space requirements apply; however, approval is conditioned upon retention of a 50-foot wide tree buffer around the fenced enclosure at the base of the tower. The height of the tower, at 156 feet is within the 180 feet allowed. As proposed the tower would be setback 172 feet, which is 110% of the total tower height, from the nearest property boundary. All applicable LTA zone development standards are met or exceeded, as conditioned. *Findings 1 2, 3, 5, 33, 35, and 38.*
3. The instant WCF has been exhaustively reviewed for its appropriateness in the location proposed. The primary location-related challenges to the proposal had to do with impacts to birds, impact to neighborhood character, and impacts on views of Mt. Rainier. View impacts are addressed in conclusion C.2 below. With respect to impact on neighborhood character, the proposed WCF would be painted dark green and kept within a 50-foot wide tree buffer around the entire fenced enclosure. The trees within that required buffer area would be retained in perpetuity, to the extent that the Applicant would be required to replace any trees that die of natural or other causes. Although taller than the existing tree heights in the immediate vicinity, the tower site is on a slope. The WCF would be visually screened by this treed buffer and its green color and according to photosimulations would be visible from some vantage points in the area, but would be not visible from many vantage points. The undersigned is not persuaded that being able to see a cell tower from a few locations is a significant impact on the rural neighborhood character. With respect to potential impacts to birds, the record includes site-specific bird surveys and an avian risk assessment that credibly concludes that the proposed tower, due to height and design that excludes warning lights at the top of the tower and guy wires, would not pose a significant risk for bird collision despite its placement between

wetlands and other waterbodies used by birds.<sup>13</sup> There is no evidence in the record suggesting any other adverse impact to adjacent property, the natural environment, traffic conditions, parking, public property or facilities, or other matters affecting the public health, safety and welfare. The associated SEPA threshold determination of MDNS was appealed and, as noted above, was affirmed on appeal, meaning the project would not result in probable, significant, adverse environmental impacts. *Findings 1, 2, 3, 4, 5, 8, 12, 13, 14, 15, 16, 17, 18, 20, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 37, 38, 39, 40, 44, 45, 46, 54, and 55.*

4. The record is devoid of challenges based on impact to public services and infrastructure. The unstaffed WCF would not result in significant traffic. There would be room off of the public road for maintenance and service vehicles to park outside the right-of-way. No public water or sewer are required. If anything, the project would be a benefit to public services in that it is expected to significantly enhance emergency response capabilities in the Lake Lawrence area. *Findings 1, 3, 40, 41, 45, 46, 50, 51, 52, 53, and 55.*

### **C. Wireless Communications Facilities Standards**

1. The record includes information from the Applicant demonstrating evaluation of alternative sites. *Findings 1, 4, 34, 36, 38, 39, and 50.*
2. The WCF is not proposed to be placed in a residential district. As proposed and conditioned, it would be located within a densely forested parcel, in a retained tree buffer, and painted dark green to blend in with the surrounding tree canopy. As is shown in the balloon photos and photosimulations of the WCF, the top of the facility may be visible against or even slightly above a backdrop of trees as seen from a particular vantage on Vail Road that also provides views of Mt. Rainier when the mountain is out; however, the line of sight to Mt. Rainier is not obstructed or impeded by the WCF, which is off to the left amongst tall trees. In determining that this placement would not have a significant impact on views of Mt. Rainier, the following information in the record is specifically on point. As proposed, the WCF is on a sloped parcel, not on a ridgeline, among tall trees. The antenna array at the top would be visible against a backdrop of trees. A condition would ensure that at least a 50-foot buffer of trees would be retained around the fenced enclosure, and the density of the tree buffer would be maintained over time as the Applicant is required to replace trees that fail within the buffer. The WCF would be painted dark green to blend in with these trees, which are presently taller than one-half of the height of the WCF. *Findings 1, 2, 3, 4, 5, 8, 33, 39, 40, 41, and 42.*
3. As concluded above, the record contains no evidence suggesting undue impacts to neighborhood character. Impacts to property values are expected to be negligible. *Findings 1, 3, 4, 5, 39, 40, 41, 42, 43, 45, 46, 51, 52, and 53.*

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<sup>13</sup> In reaching this conclusion, the instant decision does not need to decide whether Smith Ranch is properly considered a wildlife refuge for the purposes of TCC 20.33.080(2)(e)(i), because the evidence shows there is no significant impact to birds.

4. The proposed WCF would be located 430 or more feet from wetlands used by priority and listed species, and as concluded above at B3, the record contains adequate information to support a conclusion that the Applicant has shown that the WCF would not result in significant impact to birds because as designed it is short, unlit, and ungued. A condition would require an osprey hazing device atop the antennas. Another condition would require the Applicant to cooperate with state and federal agencies desiring to study impacts to birds from the tower after construction. *Findings 1, 4, 5, 8, 12, 13, 14, 15, 16, 17, 18, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 44, and 49.*

### **DECISION**

Based on the foregoing findings and conclusions, the SEPA appeal is **DENIED** and the special use permit to operate a wireless communications facility as described herein is **GRANTED** subject to the following conditions:

*Planning-related conditions:*

1. The tower shall be no higher than 150 feet above grade and no taller than 156 feet including antenna tip height.
2. The base of the antenna support structure shall be setback a minimum distance equal to 110% of the antenna support structure's height including antennas.
3. There shall be no rotary converters, generating machinery, or other equipment that would cause substantial (measuring above regulated standards at the property lines) odors, smoke, noise, electrical interference, or similar disturbances.
4. A minimum six-foot high chain link fence with privacy slats and topped with three strands of barbwire shall be maintained around the perimeter of the site. The fence and privacy slats shall be a non-reflective, deep green (Sherwin Williams Rock Garden - SW6195) to blend in with the surrounding environment.
5. The tower shall be designed to prevent unauthorized climbing of the tower or fitted with appropriate anti-climbing devices.
6. The tower shall not contain FAA or other hazard marking or lighting.
7. A minimum 50-foot wide tree retention buffer shall be established around the perimeter of the facility, excluding the access point. The Applicant shall establish an easement signed by the property owner establishing the 50-foot wide tree retention buffer to be recorded with the County Auditor prior to the issuance of any building permits. This buffer shall remain in effect for as long as the WCF/antenna support structure is located on the site. Any tree within the buffer that dies or is removed due to disease or wind throw shall be replaced during the next planting season with a minimum of two conifer trees that are a minimum of six feet in height at the time of planting.

8. Prior to building permit issuance, the Applicant shall submit updated affidavits with current property owner information.
9. Ground mounted equipment shall not exceed ten feet in height.
10. A sign shall be posted on the access gate with the WCF service provider name and an emergency contact phone number.
11. The WCF shall remain in compliance with the Thurston County Wireless Communication Facilities and Antenna Support Structure chapter (TCC 20.33).
12. Prior to final building permit approval, the Applicant shall install all landscaping as depicted on the approved landscape plan (Exhibit C1.J). If the time of year prevents the installation of landscaping, the Applicant shall submit a performance assurance guarantee in the amount of 150% of all plants and installation costs. The Applicant shall not delay performance of the approved landscape plan more than six months after construction.
13. If contamination is currently known or suspected during construction, testing of potentially contaminated media must be conducted. If contamination of soil or groundwater is readily visible, or is revealed by testing, the Washington State Department of Ecology must be notified by contacting the Environmental Report Tracking System Coordinator at the Southwest Regional Office at 360-407-6300.
14. The Applicant shall notify the Community Planning and Economic Development Department of any changes in ownership and any significant changes in technology or operation affecting the facility within 60 days of the change occurring. The current owner of the tower must provide all documents containing these conditions of approval to each new owner or lessee.
15. The Applicant shall comply with all conditions of the mitigated determination of non-significance (MDNS) dated May 3, 2018 (Exhibit C6.C).
16. The WCF shall be painted a dark green color (Sherwin Williams Rock Garden - SW6195) to blend in with the surrounding environment.
17. The Applicant shall allow any interested State or Federal agency onto the property to study or survey the subject WCF in relation to its effect on birds once the WCF is constructed.
18. All development on the site shall be in substantial compliance with the approved site plan. Any expansion or alteration of this use beyond that initially approved by the Hearing Examiner will require approval of a new or amended special use permit. The Community Planning and Economic Development Department will determine if any proposed amendment is substantial enough to require Hearing Examiner approval.

Environmental Health/Sanitary Code-related conditions:

19. The facility shall be unmanned, and plumbed restrooms that require wastewater disposal shall not be provided.
20. The proposed project shall not have any adverse impacts on the existing on-site sewage system or single-family well serving the residence located on the subject property.
21. The proposed project must comply with the noise standards of Thurston County Ordinance Title 10 and Chapters 173-58 WAC and 173-060 WAC.
22. The diesel generator used on-site must meet all storage and secondary containment requirements of the Thurston County Nonpoint Source Pollution Ordinance (Article VI of the Sanitary Code) and the Thurston County Critical Areas Ordinance, Chapter 17.15.520 C(2).
23. Batteries, some lubricants, and other potentially hazardous materials must be stored in equipment cabinets designed to contain any potential leaks or spills of hazardous materials.
24. Any future expansions of this facility may be subject to additional review and must meet all Thurston County Sanitary Code requirements for public water supply and waste water disposal.

Public Works-related conditions:

25. The proposed roadway shall conform to the Road Standards in concept and design.
26. A construction permit shall be acquired from the Thurston County Public Works - Development Review Section prior to any construction.
27. All traffic control devices shall be designed, located, manufactured, and installed in accordance with the Road Standards, Manual of Uniform Traffic Control Devices, and applicable WSDOT Standards and Specifications. A sign and striping plan shall be incorporated into the construction drawings for the project. Contact Thurston County Public Works - Development Review Section staff to obtain the most current Thurston County guidelines.
28. County forces may remove any traffic control device constructed within the County right-of-way not approved by this division, and any liability incurred by the County due to non-conformance by the Applicant shall be transferred to the Applicant.
29. The storm water management system shall conform to the Drainage Design & Erosion Control Manual.
30. All drainage facilities outside of the County right-of-way shall remain private and be maintained by the developer, owner, and/or the property owners association.

31. Stormwater runoff shall be controlled through all phases of the project by facilities designed to control the quality and quantity of discharges and shall not alter nor impact any existing drainage or other properties.
32. A Construction Stormwater Permit from the Washington State Department of Ecology may be required. Information about the permit and the application can be found at: <http://www.ecy.wa.gov/programs/wq/stormwater/construction/permit.html>. It is the Applicant's responsibility to obtain this permit, if required.
33. Proposed utility work within the Thurston County right-of-way shall conform to the Road Standards and Chapter 13.56 of the Thurston County Code. These standards do not address specific city design requirements, but rather only items such as restoration of the County right-of-way and traffic control.
  - a. Placement of utilities within the County right-of-way will require a Franchise Agreement with Thurston County pursuant to Title 13.56 TCC. This agreement shall be executed with Thurston County prior to final approval.
  - b. Please note all utilities placed parallel to and within the pavement structure are required to rebuild a minimum of half the road, to include grinding and replacement of a minimum of 0.20 feet of asphalt concrete pavement.
34. No work shall take place until a construction permit has been issued by Thurston County Public Works - Development Review Section.
35. The proposed grading or site work shall conform to Appendix J of the International Building Code, Title 14.37 of the Thurston County Code, and the Drainage Design & Erosion Control Manual.
36. When all construction and improvements have been completed, the Applicant shall contact the Thurston County Public Works - Development Review Section at 360-786-5214 to schedule a final inspection.
37. This approval does not relieve the Applicant from compliance with all other local, state, and/or federal approvals, permits, and/or laws necessary to conduct the development activity for which this permit is issued. Any additional permits and/or approvals shall be the responsibility of the Applicant. One permit that may be required is a Construction Stormwater Permit from the Washington State Department of Ecology. Information on when a permit is required and the application can be found at: <http://www.ecy.wa.gov/programs/wq/stormwater/construction/permit.html>. Any additional permits and/or approvals shall be the responsibility of the Applicant.
38. Once the planning department has issued the official approval, a construction permit application shall be submitted along with a complete set of construction drawings and the

final drainage and erosion control report to Thurston County Public Works - Development Review Section for review and acceptance.

39. Prior to construction, the Applicant shall:
- a. Pay outstanding construction review and inspection fees.\*
  - b. Receive erosion and sediment control permit.
  - c. Have the erosion and sediment control inspected and accepted.
  - d. Receive a construction permit.
  - e. Schedule a pre-construction conference with County staff.

The current fee schedule can be found online at:

<http://www.co.thurston.wa.us/permitting/fees/docs/Roads-Development-Review-Fees-20090301.pdf> or by contacting Ruthie Padilla with the Thurston County Public Works - Development Review Section by phone at 360-754-3355, ext. 6595, or by email at [padillr@co.thurston.wa.us](mailto:padillr@co.thurston.wa.us).

40. Prior to receiving final approval from this department, the following items shall be required:
- a. Completion of all roads and drainage facilities.
  - b. Final inspection and completion of all punch list items.
  - c. Record drawings submitted for review and acceptance. The record drawings shall include street names and block numbers approved by the Addressing Official.
  - d. Receipt and acceptance of Engineer's Construction Inspection Report Form (Appendix I-C, Volume I of the Drainage Design & Erosion Control Manual).
  - e. Payment of any required permitting fees.

DECIDED October 22, 2018.



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Sharon A. Rice  
Thurston County Hearing Examiner

## **Appendix A**

### **Pre- and Post-Hearing Documents from the September 11, 2018 Hearing**

1. Order Setting Hearing and Pre-Hearing Exchange Schedule, issued July 16, 2018
2. Order Correcting/Clarifying Exhibit Numbering, issued August 9, 2018
3. Appellants' Pre-Hearing Memorandum with attached Motion to Vacate MDNS and Deny SEPA permit, dated September 5, 2018, with attachments 1 through 4<sup>14</sup>
4. County letter in response to Appellant pre-hearing motion to vacate MDNS, dated August 7, 2018
5. Applicant's Response to Appellant motion to vacate MDNS, dated August 7, 2018, with attachments
6. Appellants' Reply re: Appellants' own motion to vacate MDNS, dated August 14, 2018 with attachments 1 through 3<sup>15</sup>
7. Order Ruling on Appellant Motion to Vacate MDNS, issued August 21, 2018
8. Appellants' Witness and Exhibit List, dated August 28, 2018
9. Applicant's Witness and Exhibit List, dated August 28, 2018
10. Thurston County's Exhibit List, dated August 28, 2018
11. Appellants' Post Hearing Brief (22 pages), dated September 21, 2018<sup>16</sup>
12. Applicant's Post Hearing Brief, dated September 21, 2018
13. Thurston County's Closing Argument, dated September 21, 2018

## **Appendix B**

### **Exhibit C6, Attachment K: 63 comment letters in response to May 3, 2018 MDNS**

1. Chris Nubbe, dated May 17, 2018
2. Alison Baker, dated May 17, 2018
3. Petition, dated July 2, 2015
4. Thomas Mani, dated May 17, 2018
5. Bronwen Cissna, dated May 17, 2018
6. Wally Brown, dated May 17, 2018
7. Department of Ecology, dated May 17, 2018
8. Sue Danver, Black Hills Audubon Society, dated May 17, 2018
9. Victoria Harper-Parsonson, dated May 17, 2018
10. Jack Vasoyan, dated May 17, 2018
11. Susan McLean, dated May 16, 2018

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<sup>14</sup> Appellants attached a 5th attachment to their pre-hearing motion, but it relates to health effects of wireless communication facilities and is not admitted, consistent with the ruling on the pre-hearing motions.

<sup>15</sup> Attachments 4 and 5 to Appellants' Reply to their Motion to Vacate MDNS related to health effects of wireless communications facilities and are not admitted, consistent with the ruling on the pre-hearing motions.

<sup>16</sup> Appellants post-hearing brief was 21 pages with a one page declaration of service, with 662 attached pages of exhibits - which are NOT admitted. At the conclusion of the proceedings, there was a long discussion about the fact that the record was only held open for post-hearing legal briefs and no new exhibits. Upon receipt of the Appellants' 684 page post-hearing submittal, the Applicant submitted a motion objecting to admission of the post-hearing evidence submitted by the Appellants, or in the alternative an opportunity to respond. That Applicant objection is also not admitted (because it is not needed). It was clear at the close of the hearing that no new evidence would be admitted.



12. Tom Dewell, dated May 17, 2018
13. Dave Runnels, dated May 16, 2018
14. Dr. Eva Lester, dated May 17, 2018
15. Jack Vasoyan, dated May 15, 2018
16. Leilani Macmillan, dated May 14, 2018
17. Albert M. Manville, dated May 17, 2018
18. Ted Mahr, dated May 17, 2018
19. Sue Danver, Black Hills Audubon, undated
20. Micheline Corteville, undated
21. Christy White, dated May 17, 2018
22. Christy White, dated May 10, 2018
23. Carolyn Chew, dated May 13, 2018
24. Dr. John Ruhland, dated May 14, 2018
25. Bonnie Benore, dated May 14, 2018
26. Janet Ferrari, dated May 14, 2018
27. Sheri Yeager, May 15, 2018
28. Preston Collins, dated May 14, 2018
29. Rick B., dated May 14, 2018
30. Angelika Wiczorek, dated May 14, 2018
31. Carolyn Chew and Alison Baker, dated May 14, 2018
32. Mary Atkinson, dated May 14, 2018
33. Chantal Lafont, dated May 14, 2018
34. Sam Merrill, Black Hills Audubon Society, dated May 14, 2018
35. Nancy Brink, May 15, 2018
36. Edson and Jolene Holloway, May 15, 2018
37. Deena Reeves, May 16, 2018
38. Cornelia F. O'Leary, May 17, 2018
39. Debra Nimocks, dated May 17, 2018 and Micheline Corteville, dated May 17, 2018
40. Chantal Lafont, dated May 17, 2018
41. Tree Top Flyer, dated May 18, 2018
42. Dave Runnels and Jonas Hill Lane, dated May 18, 2018
43. Mike Snider, dated May 18, 2018
44. Judith L. Lashley, dated May 18, 2018
45. Brian Cawley, dated May 18, 2018
46. S. Joan Patrick, dated May 18, 2108
47. Marian Clements, dated May 17, 2018
48. Sophie Sykes, dated May 17, 2018
49. George Mye Jr., dated May 17, 2018
50. Rebecca Em Campbell, dated May 17, 2018
51. Mary Tereszkiwicz, dated May 17, 2018
52. Victoria Harper-Parsonson, dated May 17, 2018
53. Inge Piller, dated May 17, 2018
54. Rella Schafer, dated May 17, 2018
55. Dr. Susan Mayer, dated May 16, 2018

56. Susy Wong, dated May 16, 2018
57. Kim Dan Moore, dated May 16, 2018
58. Erika Fehr, dated May 16, 2018
59. O. Zatz, dated May 15, 2018
60. Tracy Huntington McLean, dated May 14, 2018
61. Charles Pracna, dated May 11, 2018
62. Dan Page, dated May 13, 2018
63. Christy White, dated May 9, 2018

## **Appendix C**

### **Exhibit C8, 34 comment letters in response to 2018 notice of application and hearing**

1. Victoria Harper-Parsonson, dated September 11, 2018
2. Bonnie Benore, dated September 11, 2018
3. Inge Piller, dated September 11, 2018
4. Dan Page, dated September 11, 2018
5. Jean Isaacs, dated September 11, 2018
6. John Slevin, received September 10, 2018
7. Debra Southam, received September 10, 2018
8. Troy Moore, dated September 10, 2018
9. Steve Gilling, dated September 10, 2018
10. Wilfried, Delilah, Jason and Michelle Maass, received September 10, 2018
11. Chuck Flory, received September 10, 2018
12. Paul Fossum, dated September 9, 2018
13. Mary Hasken Kotacka, dated September 9, 2018
14. Christy White, dated September 9, 2018
15. Steven A. Berg, dated September 8, 2018
16. Robin Love, dated September 9, 2018
17. Harry Miller, dated September 8, 2018
18. Marian Clements and David Biering, dated September 10, 2018
19. Brian Stark, dated September 9, 2018
20. Carl M. and Brenda A. Gurley, dated September 6, 2018
21. Richard Jacobson, dated September 4, 2018
22. Robert and Diana Delgado, dated August 31, 2018
23. Sandy and Rodney Rossmailer, dated September 3, 2018
24. Virginia Grady, dated August 30, 2018
25. Krista Marcum, dated August 30, 2018
26. Laura Cattuti, dated August 29, 2018
27. Iris B. Meneghel, dated August 28, 2018
28. Tim Brown, dated August 28, 2018
29. Michael Preston, dated August 28, 2018
30. Jean Van Effen, dated August 29, 2018
31. Andrea Petri, dated August 28, 2018
32. Adam Stillman, dated August 28, 2018
33. Gary Caughlin, dated August 27, 2018
34. S. Joan Patrick, dated August 27, 2018

## **Appendix D**

### **Exhibit C9, written public comment on the special use permit application, submitted during the public comment period on September 11, 2018**

1. Sue Danver, dated September 11, 2018
2. Jean Jarecki handwritten letter, undated
3. Alan J. Hultengren, undated
4. Richard Deering, undated
5. Petition signed by 250 members of Lake Lawrence Community Citizens, undated
6. Barry Halverson, undated
7. Daren Kelly, dated September 6, 2018
8. Mike Snider, dated July 8, 2015 and second undated letter

## **Appendix E**

### **Pre-Hearing Documents from the March 15, 2016 Hearing**

1. Order Requiring Pre-Hearing Conference, dated September 30, 2015
2. Notice of Appearance, dated October 2, 2015
3. Order Setting Hearing and Pre-Hearing Scheduling, dated November 10, 2015
4. Appellants' Motion to Require Withdrawal of SEPA Determination of Non-Significance, dated December 1, 2015, including the following: Declaration of Alex D. Foster with Exhibits A - F, Declaration of Jay A. Goldstein with Exhibits G - K, and Exhibit 4 Public Comment Letter
5. Applicant's Motion to Dismiss SEPA Issues, dated December 1, 2015, including the following: Declaration of Charles E. Maduell with Exhibits 1 - 4
6. Thurston County's Response to Appellant's Motion to Require Withdrawal of DNS, December 7, 2015, including the following: Declaration of Tony Kantas
7. Applicant's Response to Appellants' Motion to Require Withdrawal of DNS, December 15, 2015, including the following: Declaration of Jeffery S. Jones with Exhibits A - C
8. Appellants' Response Memorandum re Motion to Withdraw SEPA DNS, December 15, 2015, including the following: Supplemental Declaration of Foster, Supplemental Declaration of Jay A. Goldstein, and Exhibits L, M, and N
9. Appellants' Reply Memorandum to Motion to Withdraw SEPA DNS, dated December 22, 2015 including the following: Second Supplemental Declaration of Foster and Declaration of Chris Nubbe including exhibits A - G
10. Thurston County Exhibit List, dated January 6, 2016
11. Thurston County Witness List, dated January 6, 2016
12. Applicant's Witness and Exhibit List, dated January 6, 2016
13. Appellants' Witness and Exhibit List, dated January 6, 2016
14. Applicant's Objection to Appellants' Witness List, dated January 7, 2016

15. Thurston County's Notice and Motion to Strike Appellant's Witness List, dated January 7, 2016
16. Notice of Attorney's Intent to Withdraw, dated January 8, 2016
17. Order Continuing Hearing and Ruling on Motion to Strike, dated January 14, 2016
18. Appellants' Notice of Appearance, dated January 15, 2016
19. Order Setting Hearing, dated January 26, 2016
20. Appellants' Witness & Exhibit List, dated February 1, 2016
21. On-Hold with Further Information Needed and Postponed Hearing Date, dated February 16, 2016
22. Applicant's Objection to Continuance and Request to Retain Hearing Date, dated February 17, 2016
23. Order Continuing Hearing and Striking Pre-Hearing Schedule, dated February 22, 2016
24. Applicant's Amended Witness and Exhibit List, dated March 7, 2016
25. Appellants' Amended Witness and Exhibit List, dated March 7, 2016, including the following: Declaration of Albert M. Manville, Ph.D., dated February 10, 2016, Alex Foster Credentials, Alison R. Styring Credentials, Bojana Foster Credentials, Chris F. Nubbe Credentials, Susan C. Danver Credentials, and Thomas Jurg Mani, Ph.D. Credentials

## **Appendix F**

### **List of individuals offering Public Comment at March 15, 2016 Hearing**

Inge Piller	Christy White
Edson Holloway	Sue Danver
Wayne Vanderpol	Jean Marie Mason
Burgess Meredith	Bo Foster
James Pfaff	Debra Nimocks
Gerard Moore	Jason Nimocks
Diane Dondero	Terry Kram
Richard Krueger	Wally Brown
Dr. Eva Lester	Judy Chapman
Dillard Jensen	Dan Page
Adrienne Arias	Judy Andrew
Chantal LaFont	Rella Schafer
Lyn Quayle	Alison Baker
Marian Clements	Carolyn Chew
Thomas Mani	Chris Nubbe
Ann Kennedy	Deena Reeves

## **Appendix G**

### **Attachments to Exhibit C1 – Comment Letters Submitted in 2015/16**

#### **WW.** Comment letters received in response to the Notice of Application:

1. Wally Brown, dated June 17, 2015
2. Matt Plowman, dated June 18, 2015
3. Carla Willis, dated June 30, 2015
4. Cathy & Jim Mathews, dated June 30, 2015
5. Daniel Dodge, dated June 30, 2015
6. Robert L. Hastings, dated June 25, 2015
7. Mark Biever, Thurston County Water Resources, dated June 24, 2015
8. Alex D. Foster, dated June 23, 2015
9. Gerard H. Moore & Ursula U. Schanne, received July 1, 2015
10. Sheila & Harry Divelluss, dated July 2, 2015
11. Carol Martin, dated July 5, 2015
12. Alex D. Foster, dated July 3, 2015
13. Jon Edmondson, dated April 25, 2015
14. Nancy Westergaard, dated April 3, 2015
15. Della & Dane Cabral, dated July 22, 2014
16. Debra Southam, dated July 22, 2014
17. Chawn Vance & Doyle Nickless, dated July 21, 2014
18. Bob Hastings, dated May 28, 2014
19. Jim & Sandra Pfaff, dated May 10, 2014
20. Petition containing 162 Signatures, including attachments, received July 7, 2015
21. Wally Brown, undated
22. Mike Snider, President, Lake Lawrence Community Club, dated July 8, 2015
23. James & Sandra Pfaff, dated August 12, 2015
24. Karen & Gary Nylund, dated July 11, 2015
25. John & Sharon Gray, dated July 9, 2015
26. Erica, including attachments, dated October 26, 2015

#### **XX.** Comment letters received in response to the Determination of Non-Significance:

1. Inge Piller, dated September 8, 2015
2. Roberto Mazzarella, dated September 8, 2015
3. Virginia Sablan, dated September 8, 2015
4. Micheline Corteville, including attachment, dated September 8, 2015
5. Robin Love, dated September 8, 2015
6. Roberto Mazzarella, dated September 8, 2015
7. Sandra Bocas, dated September 7, 2015
8. Don Schmidt, dated August 28, 2015
9. Tony Kantas to Alison Baker, dated September 4, 2015
10. Matt Plowman, dated August 26, 2015
11. Tom Dewell, dated August 28, 2015
12. Jean Handley, dated August 27, 2015
13. Don Schmidt, dated August 28, 2015
14. Bob Hastings, dated August 28, 2015

15. James Pfaff, dated August 28, 2015
16. Tom Dewell, dated August 29, 2015
17. Victoria Harper-Parsonson, dated September 1, 2015
18. Alex D. Foster, dated September 7, 2015
19. Alison Baker, including attachments, dated September 4, 2015
20. Janet McNamara, dated September 5, 2015
21. Stephen Mart, received September 8, 2015
22. Dr. John Ruhland & Reverend Angela Ying, dated September 6, 2015
23. Lucille Ryan, dated September 6, 2015
24. David F. Weintraub, dated September 6, 2015
25. Sophie Sykes, dated September 2015
26. Marian Clements, dated September 2015
27. Dan Page, dated September 6, 2015
28. David Biering, dated September 2015
29. Bonnie Benore, dated September 7, 2015
30. Janet Price, dated September 7, 2015
31. Divina Klein & Douglas Mackar, received September 8, 2015
32. Carolyn Chew, received September 8, 2015
33. Lyn Quayle, received September 8, 2015
34. Carla Lowery, dated September 7, 2015
35. Gloria Peach, dated September 7, 2015
36. Micheline Corteville & Giovanna E. Mendiola, dated September 7, 2015
37. David Biering, dated September 6, 2015
38. Marian Clements, dated September 6, 2015
39. Victoria Harper-Parsonson, dated September 7, 2015
40. Lucille Ryan, received September 8, 2015
41. Diane Dondero, received September 8, 2015
42. Wally Brown, received September 8, 2015
43. Andrea Levanti, received September 8, 2015
44. Frances Daniels, received September 8, 2015
45. Caryl Combs, dated September 7, 2015
46. David Runners, dated September 7, 2015
47. Bonnie Benore, dated September 7, 2015
48. Jean Marie, dated September 8, 2015
49. Alison Baker, including petition with 56 signatures, dated September 8, 2015
50. Victoria Harper-Parsonson, dated September 7, 2015
51. Karen Yule, dated September 7, 2015
52. Douglas Mackar, dated September 7, 2015
53. Chris, dated September 7, 2015
54. Mary Atkinson, dated September 8, 2015
55. Chris Nubbe, dated September 7, 2015
56. Judith Lashley, dated September. 7, 2015
57. Clare Wade, dated September 8, 2015
58. Keshia Korman, dated September 8, 2015
59. Washington State Department of Ecology, dated September 8, 2015

60. Inge Piller, dated September 8, 2015
61. Douglas Mackar, dated September 8, 2015
62. Ruth Sparrow, dated September 7, 2015
63. Petition containing 162 Signatures, including attachments, received July 7, 2015

**YY.** Comment letters received in response to the Notice of Public Hearing:

1. Cathy & Jim Matthew, dated January 13, 2016
2. Richard Jacobson, dated January 11, 2016
3. John Olson, dated January 11, 2016
4. Alfred & Dorothy Hanson, dated January 2016
5. Wayne & Wava Vander Pol, including photo, dated January 12, 2016
6. Melinda Henderson, dated January 11, 2016
7. Melinda Henderson, dated January 12, 2016
8. Dana & Della Cabral, dated January 11, 2016
9. Doyle Nickless & Chawn Vance, dated January 11, 2016
10. Hartmut & Carmen Seinsch, dated January 9, 2016
11. Carol Martin, dated January 9, 2016
12. Barry & Loma Halverson, dated January 9, 2016
13. Christina Bush, dated January 9, 2016
14. Richard Deering, dated January 8, 2016
15. Krista Marcum, dated January 8, 2016
16. Jon & Toni Carpenter, dated January 8, 2016
17. Jackie, dated January 8, 2016
18. Joan Patrick, dated January 7, 2016
19. Ronda & Steve Larson, dated January 7, 2016
20. Tara Cunningham, dated January 7, 2016
21. Wilfried, Delilah, Jason and Michelle Maass, dated January 14, 2016
22. Mark Barkley, dated January 17, 2016
23. Carlyn, Combs, dated January 16, 2016
24. Joan Patrick, dated January 15, 2016
25. Michael Louisell, dated January 12, 2016
26. Robert L. Hastings, dated January 19, 2016
27. Suzanne Shaffer, dated January 21, 2016
28. Joan Patrick, dated February 7, 2016
29. Joan Patrick, dated February 24, 2016
30. Jeremy Chenvert, dated March 2, 2016
31. Krista & Rodd Marcum, dated March 2, 2016

## **Appendix H**

### **Exhibit C5: 16 comment letters submitted in response to the 2016 Staff Report**

1. Krista Marcum email, March 3, 2016 and Krista and Rod Marcum email, March 2, 2016
2. Roberta Allen email, March 14, 2016
3. Patty Kiehne email, March 14, 2016
4. Inge Muenkel email, March 14, 2018
5. Andrea Petri email, March 14, 2106

6. Bob and Penny Owen email, March 14, 2018
7. Gregory and Sherry Smith email, October 15, 2015
8. Dennis Staples email, March 10, 2016
9. James Biehl email, March 9, 2016
10. Cathy Matthew email, March 3, 2016
11. Jackie <jackiesinner@comcast.net> email, March 4, 2016
12. Dean Jacobson email, March 4, 2016
13. Tim and Lorraine Stensager email, March 6, 2016
14. Robert Patrick email, March 3, 2016
15. Curtis Cleaveland email, March 4, 2016
16. Zack Rough email, March 3, 2016

## **Appendix I**

### **Post-Hearing Documents from the March 15, 2016 Hearing**

1. Post Hearing Order, dated March 18, 2016
2. Post Hearing Brief of Appellants, dated March 29, 2016
3. Closing Argument of Thurston County, dated April 12, 2016
4. Applicant's Post Hearing Brief in Opposition to SEPA Appeal, dated April 12, 2016
5. Appellants' Reply Brief, dated April 19, 2016
6. Applicant's Motion to Exclude Statement of Albert Manville, or Allow Rebuttal by Jeffery Jones, dated April 26, 2016<sup>17</sup>
7. Declaration of Jeffery S. Jones, dated April 26, 2016

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<sup>17</sup> No new evidence was requested in the post-hearing briefing phase following the March 15, 2016 SEPA hearing. Dr. Manville's 2016 post-hearing comments are not admitted in the record.



**THURSTON COUNTY**  
**PROCEDURE FOR RECONSIDERATION AND APPEAL**  
**OF HEARING EXAMINER DECISION TO THE BOARD**

**NOTE:** THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).

If you do not agree with the decision of the Hearing Examiner, there are two (2) ways to seek review of the decision. They are described in A and B below. Unless reconsidered or appealed, decisions of the Hearing Examiner become final on the 15th day after the date of the decision.\* The Hearing Examiner renders decisions within five (5) working days following a Request for Reconsideration unless a longer period is mutually agreed to by the Hearing Examiner, applicant, and requester.

The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K).

**A. RECONSIDERATION BY THE HEARING EXAMINER (Not permitted for a decision on a SEPA threshold determination)**

1. Any aggrieved person or agency that disagrees with the decision of the Examiner may request Reconsideration. All Reconsideration requests must include a legal citation and reason for the request. The Examiner shall have the discretion to either deny the motion without comment or to provide additional Findings and Conclusions based on the record.
2. Written Request for Reconsideration and the appropriate fee must be filed with the Resource Stewardship Department **within ten (10) days of the written decision**. The form is provided for this purpose on the opposite side of this notification.

**B. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS (Not permitted for a decision on a SEPA threshold determination for a project action)**

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.
2. Written notice of Appeal and the appropriate fee must be filed with the Community Planning & Economic Development Department **within fourteen (14) days of the date of the Examiner's written decision**. The form is provided for this purpose on the opposite side of this notification.
3. An Appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.
4. The notice of Appeal shall concisely specify the error or issue which the Board is asked to consider on Appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.
5. Notices of the Appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.
6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

**C. STANDING** All Reconsideration and Appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the Reconsideration or Appeal should be granted.

**D. FILING FEES AND DEADLINE** If you wish to file a Request for Reconsideration or Appeal of this determination, please do so in writing on the back of this form, accompanied by a nonrefundable fee of **\$688.00** for a Request for Reconsideration or **\$921.00** an Appeal. Any Request for Reconsideration or Appeal must be **received** in the Building Development Center on the second floor of Building #1 in the Thurston County Courthouse complex no later than 4:00 p.m. per the requirements specified in A2 and B2 above. **Postmarks are not acceptable.** If your application fee and completed application form is not timely filed, you will be unable to request Reconsideration or Appeal this determination. The deadline will not be extended.

\* Shoreline Permit decisions are not final until a 21-day appeal period to the state has elapsed following the date the County decision becomes final.



**Project No.** \_\_\_\_\_  
**Appeal Sequence No.:** \_\_\_\_\_

Check here for: RECONSIDERATION OF HEARING EXAMINER DECISION

THE APPELLANT, after review of the terms and conditions of the Hearing Examiner's decision hereby requests that the Hearing Examiner take the following information into consideration and further review under the provisions of Chapter 2.06.060 of the Thurston County Code:

(If more space is required, please attach additional sheet.)

Check here for: APPEAL OF HEARING EXAMINER DECISION

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW \_\_\_\_\_  
 on this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_, as an APPELLANT in the matter of a Hearing Examiner's decision rendered on \_\_\_\_\_, 20\_\_, by \_\_\_\_\_ relating to \_\_\_\_\_

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does now, under the provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of Thurston County Commissioners of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance \_\_\_\_\_
2. Platting and Subdivision Ordinance \_\_\_\_\_
3. Comprehensive Plan \_\_\_\_\_
4. Critical Areas Ordinance \_\_\_\_\_
5. Shoreline Master Program \_\_\_\_\_
6. Other: \_\_\_\_\_

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the Hearing Examiner decision.

**STANDING**

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted to the appellant. This is required for both Reconsiderations and Appeals.

Signature required for both Reconsideration and Appeal Requests

\_\_\_\_\_  
 APPELLANT NAME PRINTED

\_\_\_\_\_  
 SIGNATURE OF APPELLANT

Address \_\_\_\_\_

\_\_\_\_\_  
 Phone \_\_\_\_\_

**Please do not write below - for Staff Use Only:**

Fee of  \$688.00 for Reconsideration or \$921.00 for Appeal. Received (check box): Initial \_\_\_\_\_ Receipt No. \_\_\_\_\_  
 Filed with the Community Planning & Economic Development Department this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.