

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF BAINBRIDGE ISLAND**

In the Matter of the Application of)	No. PLN51880A CUP/WCF
)	
Smartlink Group, on behalf of AT&T)	
)	
For a Conditional Use Permit and a)	FINDINGS, CONCLUSIONS,
<u>Wireless Communication Facility Permit</u>)	AND DECISION

SUMMARY OF DECISION

The request for a wireless communication facility permit and conditional use permit to install an unstaffed telecommunications facility on an existing 35.7-foot Kitsap Public Utility District (KPUD) water tower, with associated ground equipment, on a 0.52-acre property located on NE Baker Hill Road, is **APPROVED**. Conditions are necessary to mitigate specific impacts of the proposal.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on June 10, 2021, using remote access technology.

Testimony:

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

Ellen Fairleigh, City Associate Planner
Nancy Sears, Applicant Representative

Exhibits:

1. Staff Report, dated May 27, 2021
2. Master Land Use Application, dated February 5, 2021; Owner/Agent Agreement, dated April 29, 2020
3. Notice of Complete Application, dated March 24, 2021
4. Notice of Application/Hearing, dated April 2, 2021 [With comment deadline April 23, 2021]
5. Certification of Public Notice, dated April 2, 2021
6. Certificate of Posting, dated April 1, 2021
7. Overall Site Plan (Sheet A1.0), dated January 21, 2021
8. Plan Set (10 Sheets)
9. Photo Simulations
10. View Shed Map Analysis
11. Radio Frequency Justification

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12. Acoustical Report, SSA Acoustics, dated January 14, 2021
13. Statement of Compliance, dated April 30, 2020
14. Email from Ellen Fairleigh to commenters on previous application, dated April 20, 2021
15. Comment from Mark Oppenhuizen, dated April 20, 2021, with email string
16. Design for Bainbridge Worksheet, dated January 28, 2021
17. Four (4) Site Photos, undated
18. Bainbridge Island Fire Department Memo, dated March 3, 2021
19. Public Works Development Memorandum, dated April 23, 2021
20. Building Department Memorandum, dated April 27, 2021
21. Kitsap Public Health District Approval, dated May 10, 2021, with attachments
22. Planning Commission Recorded Motion Meeting, dated May 27, 2021
23. Revised Plan Set (11 Sheets)
24. City Staff PowerPoint Presentation

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

FINDINGS

1. Smartlink Group, on behalf of AT&T (Applicant), requests a wireless communication facility (WCF) permit and a conditional use permit (CUP) to install an unstaffed telecommunications facility on an existing 35.7-foot Kitsap Public Utility District (KPUD) water tower. The proposed facility would consist of 12 antennas, 18 remote radio units, two surge protectors, and a fiber/DC cable attached to the existing water tower, as well as ground equipment, including two equipment cabinets on a 20-foot by 6-foot concrete pad and a retaining wall that would be located behind an existing pump house building. The 0.52-acre property is located on NE Baker Hill Road, to the southeast of the intersection of NE Baker Road and NE Dotson Loop.¹ *Exhibit 1, Staff Report, pages 1, 3, and 4; Exhibit 2; Exhibit 7; Exhibit 8; Exhibit 23.*
2. The City of Bainbridge Island (City) determined that the application was complete on March 24, 2021. On April 1, 2021, the Applicant posted notice of the application and associated open record hearing on the property. The next day, the City provided notice of the application and associated hearing by mailing notice to property owners within 500 feet of the subject property, posting notice at designated City locations and on the City website, and publishing notice in the *Bainbridge Island Review*, with a comment deadline of April 23, 2021. *Exhibit 1, Staff Report, page 7; Exhibits 3 through 6.*
3. In addition to the notice described above, on April 20, 2021, the City emailed three members of the public who had provided comments on a similar application previously

¹ The property is identified by tax parcel number 042402-10-054-2005. *Exhibit 1, Staff Report, page 1.* A legal description of the property is included with the site plans. *Exhibit 23.*

submitted by the Applicant in June 2020 to install a telecommunications facility on the property, which was later placed on hold by the Applicant due to a pending design change and subsequently voided by the City due to inactivity. One of the previous commenters, Mark Oppenhuizen, requested that his comment on the previous proposal be carried forward to the current proposal. Mr. Oppenhuizen's comment expressed support for the proposed telecommunications facility, noting that the area has current issues with adequate cellular coverage and that the proposed facility would have minimal environmental and visual impacts. The City did not receive any additional comments on the proposal in response to its notice materials. *Exhibit 1, Staff Report, pages 5 and 7; Exhibit 15.*

State Environmental Policy Act

4. The City determined that the proposal is categorically exempt from review under the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW), as provided in Washington Administrative Code (WAC) 197-11-800(25)(a)(i).² *Exhibit 1, Staff Report, page 1.*
5. The property is designated "Urban Residential 5" by the City Comprehensive Plan and is identified as part of the Lynwood Center neighborhood in the Lynwood Center Subarea Plan. City staff identified the following Comprehensive Plan goals and policies as relevant to the proposal:
 - Policy LU-4.1: Focus development and redevelopment on the Island over the next fifty years in designated centers that have or will have urban levels of services and infrastructure while increasing conservation, protection, and restoration on the Island, including shorelines, especially where there is interaction between the fresh and saltwater environments.
 - Goal LU-6: Ensure a development pattern that is true to the Vision for Bainbridge Island by reduction the conversion of undeveloped land into sprawling development. Encourage improvement of aging or underutilized developments over development of previously undeveloped property.
 - Policy LU-6.1: Land use designations reflect the priority of Bainbridge Island to remain primarily residential and agricultural with nonresidential development concentrated in the designated centers.
 - Policy LU-9.8: The Neighborhood Centers achieve a mix of neighborhood-scale businesses, public uses, and housing that are compatible with the scale and intensity of the surrounding residential neighborhood and that minimize the impact of noise, odor, lighting, fire safety, and transportation on the neighborhood.

² WAC 197-11-800(25)(a)(i) provides that the siting of wireless service facilities is exempt from SEPA environmental review when the project involves "[t]he collocation of new equipment, removal of equipment, or replacement of existing equipment on existing or replacement structures that does not substantially change the physical dimensions of such structures."

- Goal EC-2: Provide sufficient and resilient infrastructure that is supportive of a healthy economy and environment, particularly telecommunications and electrical reliability.
- Policy EC-2.2: Support infrastructure enhancement to accommodate new information technology and changing conditions.
- Policy EC-2.3: Implement infrastructure and technology improvements around designated centers to provide enhanced service and to retain and attract business.
- Goal U-16: Ensure adequate, cost effective, reliable, and environmentally responsible telecommunication service to the citizens of Bainbridge Island.
- Policy U-16.2: Require the placement of cellular and/or wireless communication facilities in a manner that minimizes the adverse impacts to adjacent and surrounding land uses.
- Policy U-16.3: Encourage major telecommunication utility providers to work with the City to identify potential sites for infrastructure and facility expansion to address future growth and development and meet the demands for additional utility service.
- Policy U-16.4: Encourage all providers to serve all parts of the city equally.
- Policy U-16.5: The City expects all providers to evaluate the capacity of their facilities regularly to ensure that new facilities are installed in a timely basis to meet new and future demand. Providers are expected to accommodate growth within the city.
- Policy U-16.6: Pursue internet and cellular service of the highest standards for governmental and educational institutions, business and commerce, and personal use.
- Policy U-16.7: Require new development to have underground conduits suitable for existing and foreseeable new utilities such as cable and broadband.

Exhibit 1, Staff Report, pages 6 and 7.

6. The site is zoned “Residential 5” (R-5). The purpose of the R-5 zone is to “provide for residential uses having community improvements and facilities normally associated with urban area development.” *Bainbridge Island Municipal Code (BIMC) 18.06.020.G*. BIMC 18.09.020 identifies land uses allowed within various zoning districts throughout the city. The City has determined, however, that the permitted use table under BIMC 18.09.020 has not yet been updated to reflect the current wireless communication facility regulations under Chapter 18.10 BIMC that govern the proposal.³ Pursuant to these regulations, wireless communication facilities that do not meet the definition of a “Facility I” or “Facility II” are allowed in the R-5 zoning district with CUP and WCF permit. *BIMC 18.10.030.C*. BIMC 18.10.020 defines *Facility I* as a wireless

³ City staff indicates that the deficiencies in the use table concerning telecommunications facilities are scheduled to be updated in the near future as part of the promulgation of Ordinance 2020-04. *Exhibit 1, Staff Report, page 9.*

communication facility consisting of “an antenna that is either: (1) four feet or less in height and with an area of not more than 580 square inches in the aggregate; or (2) if a tubular antenna, no more than four inches in diameter and no more than six feet in length” and defines *Facility II* as a wireless communication facility consisting of “up to three antennas, each of which is microcell with associated equipment facilities six feet or less in height and no more than 48 square feet in floor area.” Because the proposed facility would include up to 12 antennas, it does not meet the definition of a Facility I or Facility II and, therefore, requires a CUP in addition to a WCF permit. *Exhibit 1, Staff Report, pages 8 and 9.*

7. Dimensional standards applicable to the R-5 zoning district include a maximum lot coverage of 25 percent, a minimum front lot line setback of 25 feet, a minimum rear lot line setback of 15 feet, and side lot line setbacks between 5 feet and 15 feet. *BIMC 18.12.020.* City staff reviewed the proposal and determined that it would comply with the maximum lot coverage and front and side lot line setback requirements. The existing water tower on the property encroaches into the rear lot line setback, and, as currently designed, two of the proposed antennas would encroach approximately three feet into the rear setback. The Applicant would be required to redesign the proposal to avoid encroaching into the rear setback. The Applicant submitted a revised plan set demonstrating that it could meet the rear setback requirements. The City would review the Applicant’s revised plans for compliance with setback requirements during the building permitting stage. *Exhibit 1, Staff Report, pages 11 and 12; Exhibit 11; Exhibit 23.*
8. The R-5 zone has a maximum building height of 25 feet, with a 30-foot bonus for nonresidential buildings meeting CUP criteria. *BIMC 18.12.020.* In addition, a nonresidential structure may be exempted from the height restrictions applicable to the R-5 zone based on the structure’s compatibility with surrounding land uses, consistent with the criteria for a CUP. *BIMC 20.12.020.* Here, the existing water tower structure is 35.7 feet above the existing grade and the proposed antennas and ancillary equipment would increase the overall height of the water tower structure to 55.7 feet. The Applicant submitted a Radio Frequency Justification report, which determined that the proposed height of the structure would be the minimum necessary to meet service objectives within the targeted service area. *Exhibit 1, Staff Report, pages 11 and 12; Exhibit 11; Exhibit 23.*
9. The property contains a steep slope area behind an existing pump house building, where the Applicant proposes to install a concrete pad and retaining wall. The City Engineer reviewed the proposal and determined that the steep slope is approximately 10 feet in height and was artificially created and, therefore, does not constitute a geologic hazard restricting the proposed development. *Exhibit 1, Staff Report, page 8; Exhibit 23.*

10. The property is bordered to the south and west by open space tracts that are part of a residential development within the R-5 zone. Properties to the east and to the north, across NE Baker Hill Road, are zoned R-1 and are developed with single-family residences. New development projects for nonresidential uses within residential zones are generally required to provide fully screened perimeter landscaping with a minimum width of 25 feet from abutting residential uses, as well as partially screened landscaping with a minimum width of 25 feet from an abutting right-of-way. *BIMC Table 18.15.010-3; BIMC Table 18.15.010-4*. Conditions of the short plat, however, required only that a minimum 10-foot-wide buffer of shrubs and trees be provided along the north and east sides of the property and that trees naturally existing in the buffer and landscaped areas be preserved. The Applicant, on behalf of KPUD, requests that no additional landscape buffer be required due to the small size of the parcel, the existing and planned development on-site, and the existing mature vegetation and topography of the site. City staff reviewed the proposal and determined that no additional landscaping should be required, noting that future KPUD development plans restrict opportunities for planting additional landscaping around the frontage and perimeter of the property. The Applicant does not propose any tree removal as part of the project. The Applicant would not be required to provide any off-street parking for the proposed unstaffed telecommunications facility use. *BIMC Table 18.15.020-1*. The Applicant would provide outdoor lighting in accord with the outdoor lighting standards of BIMC 18.15.040. *Exhibit 1, Staff Report, pages 3, and 12 through 14*.
11. Under its wireless communication facilities (WCF) use regulations, the City prioritizes locating wireless communication facilities in the following order of preference: (1) co-location; (2) public buildings and structures in nonresidential zones; (3) buildings and structures in business and commercial zones used for research and development, commercial and business uses; and (4) buildings and structures in residential zones not used entirely for residential use, provided that facilities will not be sited on vacant residential lots. *BIMC 18.10.070*. The proposed telecommunications facility would be located in a residential zone on property not used for residential purposes. The Applicant submitted a Radio Frequency Justification report that evaluated two alternative sites within the targeted service area and determined that the alternative sites would not be suitable for meeting the area's coverage needs. *Exhibit 1, Staff Report, page 9; Exhibit 11*.
12. The City's WCF use regulations provide development standards related to: complying with Federal Communications Commission (FCC), Federal Aviation Administration (FAA), state, and City regulations and standards; locating, mounting, and designing antennas to avoid visual and aesthetic impacts; screening or camouflaging facilities using best available technology; placing equipment facilities underground if feasible; complying with security fencing requirements; considering the cumulative visual effects of wireless communication facilities; and restricting the placement of signs and

billboards. *BIMC 18.10.080*. City staff reviewed the proposal and determined that, with conditions, it would comply with the applicable development standards, noting:

- The Applicant submitted documentation indicating that the proposal would comply with applicable FCC, FAA, state, and City regulations.
- The Applicant submitted a view shed analysis indicating that the proposed antennas would be visible from 11 residential homes. The homes are located on the west side of Flying Goat Avenue NE, within Pleasant Beach Village. The proposed antennas would likely be visible by additional homes not identified in the view shed analysis because there are homes under construction in Pleasant Beach Village and because some of the affected homes identified in the view shed analysis are duplexes.
- The Applicant would mitigate visual impacts by painting the antennas, antenna mounts, and associated equipment a dark green, non-reflective color that blends in with surrounding vegetation. The Applicant submitted photographic simulations of the proposed antennas and equipment from several surrounding perspectives.
- The proposed antennas and associated equipment would be screened by existing mature vegetation, by an existing fence with privacy slats on the west side of the property, and by an existing building on the site.
- The Applicant has indicated that an underground equipment vault would not be feasible because of an existing underground pipe and because of KPUD's future development plans for the site. The proposed equipment pad would be located behind an existing building and would be screened by the existing building, existing mature vegetation, site topography, and a fence with privacy slats. The proposed equipment pad would not be within required building setback areas.
- There is an existing chain link fence surrounding the development on the property. No additional fencing is proposed.
- There is currently no other wireless equipment located on the site.
- All proposed signage depicted in the Applicant's submitted plan would be placed on the equipment cabinets.

Exhibit 1, Staff Report, pages 9 through 11; Exhibits 9 through 13; Exhibit 23.

Conditional Use Permit

13. As noted above, the Applicant requests a CUP to allow installation of an unstaffed telecommunications facility, not meeting the definition of a Facility I or Facility II, on an existing water tower located in the R-5 zoning district. City staff reviewed the proposal and determined that, with conditions, it would meet the specific criteria for a CUP under BIMC 2.16.110.F. Specifically, City staff determined:

- The proposal is exempt from Design Review Board review in accordance with BIMC 2.14.040.D.1. The Applicant submitted a "Design for Bainbridge Worksheet," and City staff determined that, due to the nature and scope of the project, there are no applicable design review provisions applicable to the proposal. The Applicant submitted documentation indicating that the proposed

unstaffed wireless communication facility would comply with all federal and state regulations and standards. The proposal would comply with applicable City regulations. The conditional use would be compatible with the intended character of the neighborhood.

- The proposed use would not be materially detrimental to uses or property in the vicinity of the subject property.
- The proposal seeks to enhance wireless infrastructure in a designated center on a developed lot. The proposal would support telecommunication coverage and reliability for both business and residential use. The Planning Commission determined that the project would be in conformance with the Comprehensive Plan and recommends approval. The City Development Engineer determined that the project would comply with the Island Wide Transportation Plan and does not recommend any frontage improvements.
- The conditional use would comply with all other application provisions of the municipal code. The proposed height of the structure is the minimum necessary to meet service objectives within the targeted service area. Measures designed to reduce the visual impacts of the antennas, such as painting the antennas a dark green, non-reflective color, as well as existing site conditions, such as site topography and mature vegetation, would ensure that the proposed structure height would be compatible with surrounding uses.
- Proposed ground equipment would be screened from view by an existing building, an existing fence with privacy slats, site topography, and existing vegetation. The Applicant does not propose to remove any trees.
- The proposal would not generate excessive noise. The Applicant submitted a noise survey prepared by SSA Acoustics, dated January 14, 2021, which determined that noise generated by the facility would meet the 45 dBA limit required under Chapter 16.16 BIMC.
- The proposal would generate one vehicle visit every two to four weeks for routine maintenance. The City Development Engineer determined that streets and nonmotorized facilities are adequate to accommodate anticipated traffic. A traffic study is not required for the proposal.
- The City Development Engineer determined that the proposal would create less than 800 square feet of new and replaced hard surfaces and would comply with surface stormwater drainage requirements. The proposal would not cause an undue burden on the drainage basin or on water quality and would not unreasonably interfere with the use of properties downstream. The proposed facility would not require public water or sewer services. The site plan as submitted demonstrates compliance with the City Design and Construction Standards and Specifications.
- The Kitsap Public Health District (KPHD) approved a Commercial Building Clearance Exemption for the proposal. KPHD did not provide any comments on the proposal because it does not require any on-site septic or water service.

- The Bainbridge Island Fire Department reviewed the proposal and recommends approval with a condition requiring that any future development comply with all provisions of the adopted Fire Code.

Exhibit 1, Staff Report, pages 14 through 17; Exhibit 16; Exhibits 18 through 23.

Testimony

14. City Associate Planner Ellen Fairleigh testified generally about the proposal and how City staff reviewed the application for consistency with the Comprehensive Plan, zoning ordinances, and the specific development standards applicable to wireless communication facilities. She noted that the Applicant submitted a revised plan set demonstrating that the project would be designed to comply with all setback requirements for the R-5 zoning district. Ms. Fairleigh stated that the proposed telecommunications facility would be located on a property developed with a KPUD water tower, pump house building, and associated equipment. She explained that the project would include attachment of up to 12 antennas and ancillary equipment to the existing water tower, as well as the installation of a retaining wall and ground equipment on a concrete pad that would be located behind the existing pump house building. Ms. Fairleigh noted that the proposed telecommunications facility would be screened by existing mature vegetation on and surrounding the site, by site topography, and by an existing perimeter fence with privacy slats, as well as by painting the proposed wireless equipment a dark green, non-reflective color to blend in with surrounding vegetation. She stated that the Planning Commission reviewed the proposal, determined that it would be consistent with the Comprehensive Plan and with applicable design guidelines, and recommends approval with conditions. *Testimony of Ms. Fairleigh.*
15. Applicant Representative Nancy Sears testified that the proposed facility would serve as a FirstNet site, which provides specific bandwidth for emergency services and first responders. She explained that the proposed telecommunications facility would not rely on a generator in the event of an emergency power outage and, instead, would rely on a backup battery cabinet located in the ground equipment area, with additional battery power to be transported to the site if necessary. *Testimony of Ms. Sears.*

Staff Recommendation

16. Ms. Fairleigh testified that the Planning Commission reviewed the proposal, determined that it would be consistent with the Comprehensive Plan and with applicable design guidelines, and recommends approval with conditions. Ms. Sears testified that the Applicant reviewed the recommended conditions of approval and would have no issue complying with the conditions. *Exhibit 1, Staff Report, pages 17 through 20; Testimony of Ms. Fairleigh; Testimony of Ms. Sears.*

CONCLUSIONS

Jurisdiction

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The Hearing Examiner is granted the authority to hear and decide the application for a conditional use permit and wireless communication facility permit. *Revised Code of Washington (RCW) Chapter 36.70.970; COBI 18.10.030.C*. The Applicant requested consolidated permit review under BIMC 2.16.170.

Criteria for Review

Major Conditional Use Permit

A major conditional use permit is a mechanism by which the city may require specific conditions on development or the use of land to ensure that designated uses or activities are compatible with other uses in the same zone and in the vicinity of the subject property. If imposition of conditions would not make a specific proposal compatible, the proposal shall be denied.

BIMC 2.16.110.A.

Under BIMC 2.16.110.E.5:

- a. The hearing examiner shall consider the application materials and the director's recommendation at a public hearing following the procedures of BIMC 2.16.100.C and applicable provisions of BIMC 2.16.020.
- b. The hearing examiner shall make compliance with the recommendations of the planning commission a condition of approval, unless the hearing examiner concludes that the recommendations:
 - i. Reflect inconsistent application of design guidelines or any applicable provisions of this code;
 - ii. Exceed the authority of the design review board or planning commission;
 - iii. Conflict with SEPA conditions or other regulatory requirements applicable to the project; or
 - iv. Conflict with requirements of local, state, or federal law.

A conditional use may be approved or approved with conditions if:

1. The conditional use is consistent with applicable design guidelines in BIMC Title 18. The conditional use is compatible with the established and intended character of the neighborhood, considering factors that include, but are not limited to, hours of operation, the type of activities generated by the use, and the predictable levels of any adverse impacts; and
2. The conditional use will not be materially detrimental to uses or property in the vicinity of the subject property; and
3. The conditional use is consistent with the comprehensive plan and other applicable adopted community plans, including the Island-Wide Transportation Plan; and

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4. The conditional use complies with all other applicable provisions of the BIMC; and
5. All necessary measures have been taken to eliminate or reduce to the greatest extent possible the impacts that the proposed use may have on the vicinity of the subject property; and
6. Noise levels shall be in compliance with BIMC 16.16.020 and 16.16.040.A; and
7. The streets and nonmotorized facilities as proposed are adequate to accommodate anticipated traffic; and
8. The city engineer has determined that the conditional use meets the following decision criteria:
 - a. The conditional use conforms to regulations concerning drainage in Chapters 15.20 and 15.21 BIMC; and
 - b. The conditional use will not cause an undue burden on the drainage basin or water quality and will not unreasonably interfere with the use of properties downstream; and
 - c. The streets, nonmotorized facilities, locations of the buildings, structures, and vehicular circulation systems as proposed align with and are otherwise coordinated with streets and nonmotorized facilities serving adjacent properties and are adequate, safe, efficient and consistent with the Island-Wide Transportation Plan; and
 - d. If a traffic study shows that the use will have an adverse impact on traffic, including nonmotorized traffic, the impact shall be mitigated as required by the city engineer; and
 - e. If the conditional use will rely on public water or sewer services, there is capacity in the water or sewer system (as applicable) to serve the conditional use, and the required service(s) can be made available at the site; and
 - f. The conditional use conforms to the “City of Bainbridge Island Engineering Design and Construction Standards and Specifications” unless the city engineer has approved a deviation to the standards; and
9. The Kitsap public health district has determined that the conditional use meets the following decision criteria:
 - a. The proposal conforms to current standards regarding domestic water supply and sewage disposal; or if the proposal is not to be served by public sewers, then the lot has sufficient area and soil, topographic and drainage characteristics to permit an on-site sewage disposal system; and
 - b. If the health district recommends approval or disapproval of the application the health district shall so advise the director; and

10. The Bainbridge Island fire department has reviewed the application and determined that the conditional use will ensure fire protection.
- ...
12. A conditional use may be approved, or recommended for approval, with conditions. If no reasonable conditions can be imposed that ensure the permit meets the decision criteria of this chapter, then the permit shall be denied.

BIMC 2.16.110.F.

Wireless Communication Facilities

All WCFs shall be constructed or installed according to the development standards set out in BIMC 18.10.080. Each permit issued shall be conditioned as set out in BIMC 18.10.050.

The Federal Telecommunications Act of 1996

In addition to considering the criteria and guidance in the Bainbridge Island Municipal Code, the Hearing Examiner must be cognizant of federal statutes and court decisions that impact what authority a local government has over the siting of wireless communication facilities.

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

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

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The criteria for review adopted by the City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings

Major Conditional Use Permit

1. With conditions, the proposal would meet the major CUP criteria of BIMC

2.16.110.F. The City provided reasonable notice and opportunity to comment on the proposal. The City received one comment from a member of the public that expressed support for the proposal, noting that there are current issues with adequate cellular coverage in the area and that the proposed wireless telecommunications facility would have minimal environmental and visual impacts. The City determined that the proposal is categorically exempt from SEPA review under WAC 197-11-800(25)(a)(i). In addition, the proposal is exempt from review by the Design Review Board under BIMC 2.14.040.D.1.

The Applicant's proposed wireless telecommunications facility would consist of up to 12 antennas, 18 remote radio units, two surge protectors, and a fiber/DC cable attached to an existing 35.7-foot KPUD water tower, as well as ground equipment, including two equipment cabinets that would be installed on a 20-foot by 6-foot concrete pad. With the addition of the proposed equipment to the existing water tower, the structure would extend to 55.7 feet in height, which is the minimum height necessary to provide adequate cellular coverage to the targeted service area. To mitigate for visual impacts of the proposed facility to neighboring residential uses, the Applicant would paint the antennas a dark green, non-reflective color to blend in with surrounding vegetation. Existing site conditions, including site topography and existing mature vegetation, would also ensure that the structure would be compatible with surrounding uses. In addition, the proposed ground equipment would be screened from view by an existing pump house building, existing fencing with privacy slats, site topography, and existing mature vegetation. The Applicant submitted a noise survey demonstrating that the proposed use would comply with the City's noise ordinance. Moreover, in lieu of using a backup generator, backup batteries would provide emergency power to the WCF equipment, further reducing potential noise impacts from the proposal.

The property is designated Urban Residential 5 by the City Comprehensive Plan. The proposed use would further several Comprehensive Plan goals and policies promoting telecommunications infrastructure enhancements that serve the community, while ensuring that such enhancements are compatible with surrounding residential uses. The property is located in the R-5 zoning district. Pursuant to the City's wireless communication facility regulations, wireless communication facilities that, like the

proposed facility here, do not meet the definition of a Facility I or a Facility II are allowed in the R-5 zoning district with a CUP. The proposed facility would comply with dimensional standards applicable to the R-5 zone for maximum lot coverage and with minimum front and side setback requirements and, as conditioned, with minimum rear setback requirements. The Applicant submitted a Radio Frequency Justification report, which determined that the proposed height of the structure would be the minimum necessary to meet service objectives within the targeted service area. The report provides a justification for allowing the proposed structure to exceed the maximum building height generally applicable to structures in the R-5 zoning district. In addition, existing site conditions (including existing mature vegetation providing screening from adjacent land uses, the small size of the parcel, site topography, conditions of short plat approval, and existing and planned future development of the property) provide a justification for not requiring the Applicant to provide additional perimeter or street frontage landscaping.

The City Engineer reviewed the proposal and determined that it would comply with surface stormwater drainage requirements, would not cause an undue burden on the drainage basin or on water quality, would not unreasonably interfere with the use of properties downstream, would not require public water or sewer services, and would comply with the City Design and Construction Standards and Specifications. The Kitsap Health District reviewed the proposal and determined that it would not require any public water or sewer services. The Bainbridge Island Fire Department reviewed the proposal and determined that, with a condition requiring that any future development comply with all provisions of the adopted Fire Code, the proposed use would ensure adequate fire protection. Conditions, as detailed below, are necessary to ensure that the proposal complies with the requirements for approval of a CUP, as well as all other federal, state, and local requirements. *Findings 1 – 16.*

Wireless Communication Facility

2. **With conditions, the proposal would meet all development standards required for a wireless communication facility under BIMC 18.10.080.** City staff reviewed the proposal and determined that it would comply with applicable FCC, FAA, state, and City regulations. The Applicant submitted a view shed analysis demonstrating that the proposed addition of antennas and associated equipment to the existing water tower would be visible from eleven homes in a nearby residential development. City staff reviewed the Applicant's analysis and determined that additional residences slated for construction may be impacted by the proposed additions to the water tower. As discussed in Conclusion 1, the Applicant would mitigate for view impacts to by painting the antennas a dark green, non-reflective color to blend in with surrounding vegetation, and existing site conditions would also ensure that the structure would be compatible with adjacent residential uses. In addition, the proposed ground equipment would be screened from view by an existing pump house building, existing fencing with privacy slats, site topography, and existing mature vegetation. An underground vault to house

equipment associated with the facility would not be feasible due to the presence of an existing underground pipe and due to KPUD's future development plans for the property. Proposed ground level equipment would be located within required building setbacks, and the existing chain link fence with privacy slats would comply with security fencing standards applicable to wireless communication facilities. There is no other wireless communication facility equipment located on the site that would create a cumulative visual effect. The Applicant would place signage only on the equipment cabinets shielded from public view by an existing pump house building, by existing mature vegetation, and by the existing fencing with privacy slats. Conditions, as detailed below, are necessary to ensure that the proposal complies with all development standards for wireless communication facilities, as well as all other federal, state, and local requirements. *Findings 1 – 16.*

DECISION

Based upon the preceding findings and conclusions, the request for a wireless communication facility permit and a conditional use permit to install an unstaffed telecommunications facility on an existing 35.7-foot KPUD water tower, with associated ground equipment, on a 0.52-acre property located on NE Baker Hill Road, to the southeast of the intersection of NE Baker Road and NE Dotson Loop, is **APPROVED**, subject to the following conditions:⁴

1. Except as modified by conditions of approval, the project shall be constructed in substantial conformance with the plan set dated January 20, 2021.
2. The WCF must comply with applicable Federal Communications Commission (FCC), Federal Aviation Administration (FAA), state, and City regulations and standards.
3. Prior to construction activity, the Applicant shall obtain the appropriate permits from the City of Bainbridge Island, including but not limited to clearing, grading, right-of-way, sign, and building permits as applicable.
4. At the time of building permit submittal, the Applicant shall submit plans and engineering with calculations that support loads caused by proposed attachment of antennas to the water tower. Connection details of attachment to water tower are also required.
5. Prior to building permit approval, the Applicant shall submit a revised site plan depicting that the proposed antennas and equipment are outside of the required rear setback.
6. Existing significant trees and vegetation shall be retained on the property in compliance with Short plat (SPT) 07-31-91-1.

⁴ This decision includes conditions required to reduce project impacts as well as conditions required to meet City code standards.

7. Tree removal is not authorized as part of this development. The Applicant must maintain the same number of tree units after the proposed development as it had before the development.
8. The antennas and associated equipment shall be painted a dark green nonreflective color to blend in with the surroundings.
9. All activities on the property must comply with the noise regulations in Chapter 16.16 BIMC.
10. Construction or installation of the WCF must commence within one year from the date of issuance of the land use permit, with opportunity for a one-year extension; otherwise, the permit shall be revoked without further action of the City and the rights and privileges appurtenant to the permit shall be void.
11. The Permittee must allow co-location of proposed WCFs on the permittee's site, unless the Permittee establishes to the City's satisfaction that co-location will technically impair the existing permitted use(s) to a substantial degree.
12. The Permittee must maintain the WCF in a state of good repair and to maintain or replace, if necessary, vegetation and landscaping required as a condition of approving the permit.
13. The Permittee shall notify the City of any sale, transfer, assignment of a site or WCF within 60 days of such event.
14. The Permittee shall comply with all provisions of Chapter 18.10 BIMC Use Regulations Wireless Communication Facilities, and all other applicable City ordinances and rules and regulations.
15. The WCF shall not be used for mounting signs, billboards, or message displays of any kind.
16. All WCFs shall be operated in compliance with federal standards for EMF emissions. Within six months after the issuance of its operational permit, the Applicant shall submit a project implementation report which provides cumulative EMF power densities of all antennas installed at the subject site. The report shall quantify the EMF emissions and compare the results with established federal standards. Said report shall be subject to review and approval by the City for consistency with the project proposal report and the adopted federal standards. If on review the City finds that the WCF does not meet federal standards, the City may revoke or modify the permit. The Applicant shall be

given a reasonable time based on the nature of the problem to comply with the federal standards. If the permit is revoked, then the facility shall be removed. This shall be a condition of the building permit.

17. All WCFs shall be operated in a manner that the WCF will not cause localized interference with the reception of area television or radio broadcasts, garage door openers, portable phones and other similar FCC approved devices. If on review of a registered complaint the City finds that the WCF interferes with such reception, the City may revoke or modify the permit. The Applicant shall be given a reasonable time based on the nature of the problem to correct the interference. If the permit is revoked, then the facility shall be removed.
18. A WCF shall be removed within 90 days of the date the site's use is discontinued, it ceases to be operational, or the permit is revoked; or if the facility falls into disrepair and is not maintained, within 90 days of a notice from the City to effect repairs and maintenance to the satisfaction of the City. The operator of a WCF shall notify the City upon the discontinued use of a particular facility. Should the operator fail to remove the WCF as required herein, and the property owner fails to remove the WCF within 90 days of the date the City notifies the property owner to remove the WCF, then the WCF shall be a nuisance and subject to appropriate legal proceeding.
19. If any historical or archaeological artifacts are uncovered during excavation or construction, work shall immediately stop and contact the Department of Planning and Community Development and the Washington State Department of Archaeology and Historic Preservation shall be immediately notified. Construction shall only continue thereafter in compliance with the applicable provisions of law.
20. Outdoor lighting shall comply with BIMC 18.15.040 and verified at the time of building permit review. Compliance will require exterior lighting to be shielded and directed downward.
21. Proposed underground utilities (power/fiber, etc.) shall be located/routed to minimize site disturbances to the maximum extent feasible.
22. Use of soil sterilant to construct the lease area pad shall be strictly prohibited.
23. Any concrete retaining wall greater than 48" from base of footing to top of wall requires a separate building permit or structural engineering design/calcs included with any follow-on building permit.
24. The project as proposed is subject to Stormwater Minimum Requirement #2, Temporary Erosion and Sediment Control. During the approved work, erosion and sedimentation

control devices shall be installed in accordance with best management practices, but ONLY as site conditions dictate. The Applicant is responsible for 13 elements of WA state mandated erosion control plan per 2014 Stormwater Manual for Western Washington. The Applicant shall provide appropriate measures to prevent sediment track out onto COBI maintained roads and protect all exposed soils to prevent airborne sediment (dust) or sediment laden water from leaving the site during construction.

25. Any future development shall comply with all provisions of the adopted Fire Code.

DECIDED this 23rd day of June 2021.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center