

NATURE OF THE DECISION

Petitioner appeals a city hearings official’s decision that grants a discretionary use permit for a wireless telecommunication system (WTS) facility.

FACTS

The site for which the applicant T-Mobile sought approval is located on Yolanda Avenue (the Yolanda Avenue site) and is zoned Neighborhood Commercial. The City of Springfield apparently prefers that WTS facilities be located in nonresidential areas. To further this preference, the city groups its zoning districts into three groups. Sites in the first group (Preferred Sites) are generally zoned industrial or for public use and may be developed with WTS facilities without a quasi-judicial land use hearing. Only nondiscretionary building and electrical permits are required for Preferred Sites. Sites in the second group (Acceptable Sites) are zoned for commercial, industrial and mixed uses and WTS facilities on Acceptable Sites require site plan approval through the city’s Type II process, in addition to building and electrical permits.¹ Finally, sites in the third group (Conditionally Suitable Sites) are zoned for a variety of commercial and residential uses. WTS facilities on Conditionally Suitable Sites require discretionary use permits and a public hearing. The Yolanda Avenue site is a Conditionally Suitable Site.

In addition to making it easier from a land use regulatory perspective to site WTS facilities on Preferred Sites, Springfield Development Code (SDC) 4.3-145(C)(3)(b)(iii) requires that developers of WTS facilities show that they made a good faith effort to locate WTS facilities on the sites that require a less rigorous approval process. In this case, that means T-Mobile was required to make a good faith effort to site the needed WTS facility on

¹ Under the city’s Type II process, the city provides notice and an opportunity to comment on a Type II application. Following that opportunity to comment a decision is rendered and there is no public hearing unless a local appeal is filed to challenge the initial Type II decision. Springfield Development Code (SDC) 5.1-130.

1 a Preferred Site or an Acceptable Site, before seeking approval of the WTS facility on the
2 Yolanda Avenue site.² In two assignments of error, petitioners contend the hearings official
3 erroneously found that that the applicant made the good faith efforts that are required by
4 SDC 4.3-145(C)(3)(b)(iii).

5 **FIRST ASSIGNMENT OF ERROR**

6 T-Mobile currently has two WTS facilities on the western edge of the city (Gateway
7 Mall facility and West Centennial facility). It also has two facilities in the southeastern part
8 of the city (Mohawk facility and Olympic facility). The planning staff report in this matter
9 describes the gaps in coverage that result from the current WTS facilities. Record 182-83. A
10 map that was included in the application displays current coverage. Record 375. The map at
11 Record 375 shows the areas in the city that currently receive adequate “indoor” service,
12 adequate “in car” service and adequate “outdoor” service. These service levels are additive
13 in the sense that areas with adequate “indoor” service also have adequate “in car” service and
14 areas with adequate “in car” service also have adequate “outdoor” service. The map at
15 Record 375 shows that the northern part of the city, which is located farthest from T-
16 Mobile’s four existing WTS facilities, receives the poorest coverage.

17 T-Mobile seeks to improve indoor coverage in north Springfield, particularly in the
18 vicinity of Yolanda Avenue and areas to the north. The map that appears at Record 376
19 shows how that coverage would be improved by a WTS facility at the Yolanda Avenue site.
20 According to the application, T-Mobile identified a search area (Record 355, 395) and sought
21 to identify collocation opportunities and sites that would require a less rigorous approval
22 process than the Type III process that is required for the subject Conditionally Suitable
23 Yolanda Avenue site. Record 355. No collocation opportunities were identified. T-Mobile

² SDC 4.3-145(C)(3)(b)(iii) requires that an applicant for a WTS facility must provide “[v]erification of good faith efforts made to locate or design the proposed WTS facility to qualify for a less rigorous approval process (building permit or site plan approval).”

1 identified two potential sites that are zoned Public Land and Open Space Zone, making them
2 Acceptable Sites. One of those sites is the Briggs Middle School/Yolanda Elementary
3 School site (Yolanda Elementary School site) and the other is the Eugene Water and Electric
4 Board/Vitus Butte site (Vitus Butte site). According to the application, the owners of the
5 Yolanda Elementary School site and Vitus Butte site denied T-Mobile permission to use
6 those sites. The application also identifies two industrial sites southeast of the Yolanda
7 Avenue site, but takes the position that those sites are “too close to the two existing T-Mobile
8 sites, Olympic and Mohawk.” Record 355.

9 A potential site that was not examined by T-Mobile before it submitted its application
10 is what is referred to as the Moe Mountain site, which is located east and south of the
11 Yolanda Avenue site. After planning staff identified the Moe Mountain site as a potential
12 site, the service levels that would be achieved by the Yolanda Avenue and Moe Mountain
13 sites were compared. Record 179. T-Mobile took the position that there were technical
14 reasons why the Moe Mountain site is not a viable alternative. Record 180, 203.

15 The hearing official concluded that T-Mobile satisfied the “good faith” effort
16 required by SDC 4.3-145(C)(3)(b)(iii). The hearing official adopted the following findings
17 in support of that conclusion:

18 “The applicant has examined various locations that would require a less
19 rigorous approval process than that required of siting the facility on the
20 subject property. The use of the Yolanda Elementary School site and the
21 Vitus Butte site were denied to the applicant by their respective land owners.
22 The site north of the McKenzie River was not suitable for several reasons.
23 There are also no sites suitable for collocation. Finally, *the Moe Mountain*
24 *site was analyzed and found to be wanting because it did not cover the target*
25 *area as well as the proposed site and because it would cause signal*
26 *interference with existing T-Mobile sites in the area.*

27 “A ‘good faith effort’ must be analyzed in the context of the goals of the
28 telecommunications company. In the present case, the intent of the applicant
29 is to provide better Indoor coverage in an area described as Marcola Road on
30 the south, 28th Street on the west, Hayden Bridge Road on the north and an
31 area northeast of Mohawk Blvd. *The proposed site accomplishes this better*
32 *than the Moe Mountain site and does so without creating interference*

1 *problems with the coverage provided by existing T-Mobile sites to the*
2 *southeast of the proposed Yolanda site.*

3 “Conclusion

4 “The major issue in this request for discretionary use approval is whether the
5 applicant has made a ‘good faith effort’ in placing its proposed WTS facility
6 at a location that requires the least rigorous approval process. First, the
7 applicant pointed out that there were no existing WTS facilities that would
8 provide adequate coverage through collocation. Second, the two most
9 obvious alternative locations that offered a less restrictive approval process,
10 the Yolanda Elementary School site and the Vitus Butte site, were denied to
11 the applicant by their respective landowners. A site located outside of the
12 Springfield Urban Growth Boundary on the north side of the McKenzie River
13 also was found not to provide adequate coverage and is subject to an approval
14 process that appears to be more restrictive than the discretionary use permit
15 process currently being pursued. Finally, staff questioned whether the
16 proposed facility could not be placed on Moe Mountain, a site zoned PLO that
17 would only require a Type II approval process.

18 “It is clear that the Moe Mountain site provides better coverage to some areas
19 than would the proposed Yolanda Avenue site. It is also possible that this site
20 provides better coverage to a slightly greater number of existing T-Mobile
21 customers. However, if one factors in the area and nature of the service
22 enhancement targeted by the applicant, the proposed WTS facility site is
23 clearly superior. *Further, the applicant’s concern about interference from a*
24 *Moe Mountain facility with signals from its existing WTS facilities was not*
25 *refuted by the opponents.* I am extremely hesitant to substitute my judgment
26 in regard to what is best for a cell phone network over that proposed by the
27 provider of that service.”³ Record 64-65 (emphases added).⁴

³ Earlier in his decision, the hearings official adopted the following additional findings addressing the respective merits of the Yolanda Avenue site and the Moe Mountain site:

“In comparison with the Moe Mountain site, the proposed Yolanda [Avenue site] would extend Indoor coverage slightly farther north, much farther to the northwest but not nearly as far to the east and northeast. Expansion of In Car coverage is greater to the northwest and east than the Moe Mountain site but is similar in other directions. Outdoor coverage does not appear to be affected. The greater coverage by the Moe Mountain site to the south overlaps with the service that [is] provided by the existing T-Mobile Mohawk and Olympic sites and would cause signal interference in that area. The overlap would cause the T-Mobile towers to hand-over excessively, degrading the quality of the call, and which could eventually lead to a dropped call. In addition, the interference would degrade the triangulation process of the 911 system for mobile phones where currently, the system may triangulate your phone within a ranger of 10 feet or less.” Record 55.

⁴ The emphases are added to highlight that a key concern in the hearings official’s decision concerning the potential suitability of the Moe Mountain site was the potential for interference with T-Mobile’s existing

1 **A. The Meaning of “Good Faith”**

2 It is not clear whether petitioner contends that the hearings official misinterpreted the
3 SDC 4.3-145(C)(3)(b)(iii) “good faith” standard. To the extent that he does, we reject the
4 challenge. Petitioner takes the position that the SDC 4.3-145(C)(3)(b)(iii) “good faith”
5 standard requires that T-Mobile make a “reasonable” or “sincere” effort to locate the WTS
6 facility at a feasible Preferred Site or Acceptable Site. That also appears to have been the
7 view of the hearings official in this case. Petitioner simply contends that the hearings official
8 failed to establish that T-Mobile made a reasonable or sincere effort and that the record does
9 not establish that it did.

10 We do not agree that the hearings official misinterpreted the SDC 4.3-
11 145(C)(3)(b)(iii) “good faith” standard. To the extent petitioner argues otherwise, we reject
12 the argument.

13 **B. Reliance on EWEB and School District Staff to Rule Out the Yolanda**
14 **School site and the Vitus Butte site**

15 Petitioner argues that T-Mobile should not have relied on decisions by Eugene Water
16 and Electric Board (EWEB) and School District staff that no portions of the Yolanda
17 Elementary School site and Vitus Butte sites would be made available to T-Mobile for
18 development of a WTS facility. Petitioner suggests T-Mobile might have gotten a favorable
19 response from the EWEB and the school district if it had requested permission to site its
20 WTS facility directly from the school district and EWEB governing boards.

21 The school district’s refusal came from the “Director of Communications and
22 Facilities.” Record 170. The EWEB refusal came from the “EWEB Property Manager.” We
23 do not agree that under SDC 4.3-145(C)(3)(b)(iii) T-Mobile was obligated to inquire beyond
24 the school district’s and EWEB’s professional staff and attempt to secure approval directly
25 from those bodies’ governing boards.

Mohawk and Olympic facilities to the south. As we explain below, petitioner does not believe those concerns are well-founded.

1 **C. Failure to Identify the Area to Be Served**

2 Petitioner argues that T-Mobile did not adequately identify the area it was attempting
3 to serve:

4 “For starters, there is nothing in the record that identifies the precise
5 ‘coverage area’ that T-Mobile is attempting to serve.” Petition for Review 8.

6 Petitioner also argues that T-Mobile did not adequately identify the Preferred Sites and
7 Acceptable Sites that it considered before seeking approval of the disputed Conditionally
8 Approved site.

9 While T-Mobile could probably have been a bit more precise in identifying the
10 geographic area where it seeks to improve service and the kind of service coverage it seeks to
11 achieve with the disputed WTS facility, we do not agree its efforts in that regard constitute a
12 basis for remand. The application included a map that displays “North Springfield area
13 Current Coverage.” Record 375. It is clear from that map that a fairly significant area of
14 North Springfield currently does not receive indoor service from T-Mobile’s existing four
15 WTS facilities. It is sufficiently clear from the application that T-Mobile seeks to extend
16 indoor service to as much of that area of North Springfield as possible and that a WTS
17 facility at the disputed Yolanda Avenue site would extend indoor service to an area of North
18 Springfield that does not now receive indoor service and similarly extend in car and outdoor
19 service to the north, northwest and northeast. The map at Record 395, while somewhat
20 general, apparently identifies the search area T-Mobile used to locate potential WTS facility
21 sites. We conclude that T-Mobile adequately identified the area where it hopes to improve
22 service, the kind of service it hopes to provide and the area it considered for siting a WTS
23 facility to provide that desired service.

24 We turn next to petitioner’s contention that T-Mobile inadequately identified
25 Preferred Sites and Acceptable Sites that might feasibly satisfy the improved coverage need
26 that T-Mobile has identified. We agree with petitioner that under the SDC 4.3-
27 145(C)(3)(b)(iii) “good faith” standard, T-Mobile was obligated to make a reasonable and

1 sincere effort to locate a suitable Preferred or Acceptable Site that would meet T-Mobile’s
2 identified service need. In other contexts, we have explained generally how an applicant
3 may go about fulfilling that kind of obligation. For example, under ORS 215.275(2), utility
4 facilities may be sited on exclusive farm use (EFU) zoned lands if reasonable alternative sites
5 that are not zoned EFU have been considered and it is determined based on certain factors set
6 out in the statute that the facility must be sited on EFU zoned lands. Our cases regarding
7 ORS 215.275(2) have explained that the statute “requires that an applicant make a reasonable
8 effort to identify feasible non-EFU-zoned alternative utility facility sites, and where another
9 party ‘identifies an alternative site with reasonable specificity to suggest that it is a feasible
10 alternative,’ that site must also be considered.” *Van Nalts v. Benton County*, 42 Or LUBA
11 497, 499 (2002) (quoting from *Jordan v. Douglas County*, 40 Or LUBA 192 (2001)). We
12 believe a similar burden is imposed by SDC 4.3-145(C)(3)(b)(iii). T-Mobile was obligated
13 under SDC 4.3-145(C)(3)(b)(iii) to make a reasonable effort to identify feasible Preferred
14 Sites and Acceptable Sites and was required to consider any other Preferred Sites or
15 Acceptable Sites that were identified with reasonable specificity.

16 With regard to whether T-Mobile made such a reasonable effort, we have already
17 explained that T-Mobile considered the Yolanda Elementary School site and Vitus Butte site,
18 but was informed by the owners that it would not be granted permission to use those sites for
19 a WTS facility. When asked to consider the Moe Mountain site, T-Mobile did so and
20 explained why it is not a feasible alternative.⁵ T-Mobile apparently also considered other
21 industrially zoned sites.⁶

⁵ We consider petitioner’s challenge concerning the feasibility of the Moe Mountain site under the second assignment of error.

⁶ As we noted earlier, the application states that “industrially zoned parcels to the southeast of the [Yolanda Avenue site] are too close to the two existing T-Mobile sites, Olympic and Mohawk.” Record 355.

1 Petitioner appears to suggest that there are additional potentially feasible Preferred
2 Sites and Acceptable Sites that T-Mobile should have considered. But if that is the case,
3 petitioner does not identify any additional potentially feasible Preferred Sites or Acceptable
4 Sites in the petition for review. As far as we can tell, with two exceptions, opponents also
5 did not identify any additional potentially feasible Preferred or Acceptable Sites below. The
6 two exceptions are “the former Ore-Aqua (salmon hatchery) site * * * as well as property
7 next to EWEB’s intake facility that is owned by Child Center * * *. Record 137. There may
8 be reasons why these sites are not available or technically feasible, but the challenged
9 decision does not mention or consider the availability or feasibility of those two sites.
10 Remand is required so that the availability and feasibility of those sites can be considered.
11 Specifically, to comply with SDC 4.3-145(C)(3)(b)(iii), T-Mobile must demonstrate that it
12 would be unreasonable to require T-Mobile to design and place the proposed WTS facility at
13 either of those locations.

14 The first assignment of error is sustained in part.

15 **SECOND ASSIGNMENT OF ERROR**

16 In this assignment of error, petitioner repeats some of the arguments that he made
17 under the first assignment of error. We need not and do not consider those arguments further
18 here. But petitioner does challenge the hearings official’s reasoning in which he concluded
19 that T-Mobile adequately demonstrated that the Moe Mountain site is not a feasible
20 alternative to the Yolanda Avenue site.

21 The hearings official acknowledged that the Moe Mountain site would serve some of
22 the same areas that the Yolanda Avenue site would serve and that each of those sites would
23 serve some areas that the other would not. Petitioner argues:

24 “It does not matter that the Planning Staff believed that the Moe Mountain site
25 provided nearly the same or better quality of service coverage or that the
26 neighbors presented testimony that their cell phone service was presently
27 adequate. In fact, one of the neighbors, an electrical engineer, presented
28 testimony that questioned the technical information submitted by T-Mobile

1 regarding service needs and the unsuitability of the Moe Mountain site.
2 Contrary to the Hearings Official's dismissal of this testimony, this
3 information raised questions about T-Mobile's responsiveness as well as the
4 accuracy of its information.

5 "Essentially, the Hearings Official accepted T-Mobile opinion as conclusive
6 ('hesitant to substitute my judgment') without any consideration of the
7 neighbors' or Staff's opinion and materials. As suggested by Petitioner, the
8 Hearings Official could have required T-Mobile to submit a peer review
9 evaluation of its materials about service coverage needs for the North
10 Springfield area and the various sites that were being suggested. This would
11 have been a reasonable way for T-Mobile to demonstrate it was making a
12 'good faith effort'. This does not mean peer review should be required for all
13 applications but certainly when the local Planning Staff and neighbors raise
14 questions about the accuracy and scope of the applicant's technical
15 information, an independent review would support a conclusion that a 'good
16 faith effort' has been made to locate an appropriate site.

17 "The point of this Assignment of Error is that the Hearings Official gave too
18 much deference to the 'goals of the telecommunication company' and
19 appeared to accept their statements, materials and opinion without seriously
20 questioning their accuracy, veracity, and support after they had been
21 challenged in the public hearing process. * * *" Petition for Review 14-15
22 (record citations omitted).

23 We do not agree that the hearings official was improperly deferential to T-Mobile's
24 desire to improve service to the north and northwest and to T-Mobile's concerns about the
25 interference that was likely with its Mohawk and Olympic facilities to the south if the Moe
26 Mountain site were selected. Neither do we agree with petitioner that the hearings official
27 failed to consider opponents' arguments or evidence.

28 We believe it was particularly appropriate for the hearings official to be reluctant to
29 issue a decision that might force T-Mobile to construct its facility on Moe Mountain, when
30 T-Mobile's engineer stated that a WTS facility in that location would result in interference
31 with T-Mobile's existing Mohawk and Olympic facilities and fail to provide improved
32 service to customers to the northwest that T-Mobile wishes to serve. We assume the
33 hearings official was relying on a letter from Gillespie, Prudhon & Associates
34 Telecommunications Engineers and evidence from T-Mobile's "RF Engineer," when he

1 expressed reluctance to second-guess T-Mobile's positions regarding the service and
2 interference shortcomings associated with the Moe Mountain site. Record 180, 203.⁷ As
3 petitioner correctly notes, there is evidence in the record that contradicts that evidence and
4 takes the position that the Moe Mountain site is superior to the Yolanda Avenue site. Record
5 142. However, that contradictory evidence is not such that it was unreasonable for the
6 hearings official to rely on the evidence at Record 180 and 203 to reach the conclusions that
7 he reached. The evidence that the hearings official relied upon seems at least as persuasive
8 as the opposing evidence. At most, the expert testimony is evidence that conflicts with the
9 positions of T-Mobile's engineer and Gillespie, Prudhon & Associates and it was well within
10 the hearings official's discretion to rely on the evidence he relied on.

11 The second assignment of error is denied.

12 The hearings official's decision is remanded.

⁷ T-Mobile's engineer took the position that the Moe Mountain site would not extend sufficiently to the north or northwest and would create interference problems with the Mohawk and Olympic facilities. Record 203. The Gillespie, Prudhon & Associates letter discusses the technical problems and service deterioration that can result from such interference.