



MEMORANDUM

November 9, 2021

TO: Gorge Commissioners

FROM: Jeff Litwak, Counsel

SUBJECT: Staff Report for Appeal Hearing: *Kuehl v. Skamania County*, CRGC No. COA-S-21-01, Scheduled for November 9, 2021

Action Requested

On November 9, 2021, you will hear oral argument and deliberate to an oral decision on an appeal entitled, *Kuehl v. Skamania County*, CRGC No. COA-S-21-01. I have drafted this staff report to assist you in your resolution of this appeal. I can answer questions as you review the materials prior to the hearing and at the hearing.

Your decision requires a simple majority of a quorum of commissioners. So far, I have not heard that any commissioners will be absent on November 9, 2021. If all commissioners participate in the hearing, a decision to reverse or remand the county's decision will require at least seven votes.

Order of the Hearing

1. Chair calls the hearing to order and reviews the notice of hearing;
2. Chair asks members of the Commission for disclosures of conflicts of interest, potential bias, appearance of fairness concerns, and ex parte communications; parties may ask questions or challenge commissioners' participation; resolution of concerns and challenges;
3. Commissioners state questions that they wish the parties to address in their oral arguments;
4. Parties present their arguments;
5. Commissioners ask questions of the parties (parties get two minutes per side to answer questions);
6. Commissioners deliberate to an oral decision.

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Purpose of this Staff Report

This staff report is my understanding of the parties' arguments and the administrative record. You may use this staff report to help you organize your review and analysis but this staff report is not a substitute for reading the briefs, reviewing the record, and deciding the issues as the parties present them. The details in the parties' arguments are important. I am providing a copy of this staff report to the parties as well. If a party believes that I have misunderstood that party's argument, that party can address the misunderstanding during oral argument at the hearing. There is no opportunity for the parties to file written responses to this staff report.

I have made some recommendations throughout the staff report. You do not need to follow my recommendations; you are the decision makers. I can help guide you to a coherent final decision at the hearing no matter what you decide at any decision point.

Your hearing package includes the following documents:

1. This staff report;
2. Notice of Hearing;
3. Record of Skamania County's proceeding;
4. The following briefs:
 - a. Appellants' Brief (by Michael Wardell representing Viviann Kuehl and Sue Kuehl Pederson;
 - b. Skamania County's Response Brief;
 - c. Smartlink LLC for AT&T's Response Brief (SmartLink LLC for AT&T ("AT&T") is the applicant);
5. The following federal telecommunications law material:
 - a. 47 C.F.R. § 16100 (relating the eligible facilities requests);
 - b. FCC Order No. 14-153 (Oct. 17, 2014) (responding to public comments and justification for adopting section 16100);
 - c. FCC Order No. 20-75 (June 10, 2020) (responding to public comment and announcing the beginning of rulemaking to clarify section 160100);
6. A copy of Skamania County Code § 22.06.140 (NSA expedited development review process and standards) (from the Skamania County website)

You have copies of the National Scenic Area Act and Commission Rules in your Commissioner Handbook. The National Scenic Area Act and Commission Rules are also posted on the Gorge Commission's website at <http://www.gorgecommission.org/about-crgc/legal-authorities/> (scroll down). Copies of the Gorge Commission appeal decisions cited in the parties' briefing and this staff report are available on the Gorge Commission's website at <http://www.gorgecommission.org/about-crgc/appeals/> (organized by date with the newest on top). Skamania County's National Scenic Area land use ordinance is at <https://www.codepublishing.com/WA/SkamaniaCounty/#!/SkamaniaCounty22/SkamaniaCounty22.html>.

Please contact me if you can't find these authorities or any other authority that you would like to review as you prepare for the hearing. Because this hearing is via Zoom webinar, I cannot give paper copies at the hearing for reference. You may wish to have open copies of the appeal packet documents and legal authorities ready for you to look at during the hearing. I use tabs in Adobe Acrobat for having several documents open at once. You should practice setting up your screen to

see the hearing in a Zoom window while also having easy access to the briefs and record and other reference material.

Applicable Rules and Hearing Procedure

The appellants brought this appeal under Commission Rule 350-60. I recommend you review Commission Rule 350-60-120 and -220 (concerning oral argument and standards of review) and the Notice of Hearing. Remember, the Notice of Hearing specifies the procedure for this hearing. Please keep in mind that the parties will have prepared oral argument, so any questions you want them to address takes away from their prepared argument time. The public may attend and listen, but this is not a public hearing.

Hearing Fairness

Commission rules require this hearing to be objectively fair and to appear fair to a reasonable person. To help ensure a fair hearing, I alerted you to this appeal in June 2021, right after I became aware of the possibility of this appeal and advised you to avoid communications about the appeal, property and persons involved in the appeal.

At the beginning of the Commission's hearing, the Chair will request commissioners disclose any conflicts of interest, bias, prejudice, and appearance of fairness concerns toward or against the project or any party and any *parte* communications. If you have any questions about whether you need to make a disclosure, please call me and I will discuss it with you individually.

Conflicts of Interest/Bias/Appearance of Fairness

A conflict of interest involves any financial interest with one or more of the parties, with the property in question, or in the outcome of the appeals. You must disclose any conflict involving you or your immediate family. Bias, prejudice, and appearance of fairness concerns arise when there are facts that would lead a reasonable person to believe that you cannot be a fair decision-maker in this appeal. You must disclose written or oral communications, statements, current or prior memberships, friendships, employment or other professional relationships, and other factors that might lead to such a concern.

***Ex Parte* Communications**

If you have had conversations that directly or indirectly relate to this appeal, you must disclose those conversations. A complete disclosure includes when you had the conversation, who you spoke with, and a summary of what you heard or discussed.

Objections to a Commissioner's Participation in the Appeals

One or more of the parties may object to a commissioner's participation. If that occurs, the full Commission may discuss that individual commissioner's participation, but the ultimate decision about whether to participate remains with the individual commissioner at issue. If that commissioner chooses not to participate in the appeal, that commissioner should leave the hearing room (the Zoom webinar) so there is no risk that commissioner will interact with the remaining decision-making commissioners. If a commissioner participates, but a court later determines that commissioner should have recused themselves, the court can remand the matter back to the Gorge Commission for a new hearing without the participation of that commissioner.

Standards of Review

Your review of the Hearings Examiner's decision is limited to the "standards of review," in Commission Rule 350-60-220. Think of standards of review as the tests through which you must consider the Hearings Examiner's decision. If the decision passes these tests, then you would affirm; if not then you would remand or reverse.

The appellants' brief identifies the standards of review that they believe apply to only some of their assignments of error but not to all the assignments of error. I have filled in where the parties did not brief the standards of review based on my understanding of the parties' arguments. If you believe other standards of review apply, you should apply those. The parties did not brief how courts have interpreted and applied those standards of review, so I have done that too.

You must frame your deliberations and decision as whether the decision satisfies the applicable standards of review. You cannot decide the appeals based on standards or reasoning outside of the standards of review.

Summary of Facts

The appellants' brief contains their recitations of the facts that they believe are important to the appeal. Skamania County and AT&T did not. You do not need to accept the appellants' statement of facts if you believe the administrative record shows different facts. Review the briefs and the pages of the record that the parties refer to in their briefs.

In this staff report, I refer to pages to the record as "AR ___." "AR" stands for "administrative record" and sequential page number in the record. My AR citations follow the fact that I provide you. The appellants use the term "RI _ at ___" "RI" stands for "appeal record number," corresponding to the numbered list in the table of contents of the record, and the sequential page number. The sequential page number is the important reference. AT&T and Skamania County use the term "Record" followed by the sequential page number. All references are to the page numbers at the bottom of each page in the record document, not the page count in your .pdf reader.

Before continuing in this staff report, I recommend you read the following pages of the record in the following order to introduce you to the facts, the decision on appeal, and the context of the issues on appeal. You still must read the whole record. The parties cite to many other pages in the record.

Pages 430-448 - Skamania County's staff decision and supporting staff report

Page 336-51 - AT&T's motion to dismiss the appeal to the hearing examiner.

Pages 327-35 - Appellants' response to AT&T's motion to dismiss

Pages 324-26 - Skamania County response to AT&T's motion to dismiss.

Pages 312-23 - AT&T's reply to Appellants' response to motion to dismiss

Pages 306-11 - Hearing examiner's ruling on AT&T's motion to dismiss

Appendix B of the Appellant's Brief—a transcript of the hearing examiner's hearing.¹

Pages 9-23 - Hearing examiner's decision

¹ The Appellants do not explain the origin of the transcript. It is not certified by a transcriptionist or other county official; nevertheless, no party argues that it is inaccurate, so I recommend you may rely on it.

Assignments of Error

Summary

The appellants' brief raises 15 assignments of error, grouping them into three groups. At base, the appellants are arguing:

- A. Skamania County erred by accepting and reviewing an incomplete application (assignments of error 1–7, appellants' brief pages 25–40);
- B. Skamania County's decision was clearly erroneous, arbitrary and capricious, violates a provision of applicable law and improperly construes applicable law (assignments of error 8–11 and 15; appellants' brief pages 40–48); and
- C. Skamania County committed procedural errors (assignments of error 12–14; appellants' brief pages 48–50).

The appellants' brief organizes the assignments of error different from other briefs the Commission has received in the past. I discuss this in each section below. Also, the appellants' brief does not give concise statements of each assignment of error. I created brief statements for your use based on the appellants' arguments. These statements of the assignments of error are entirely my work, not the appellants' work. Please do not use my concise statements as recommendations that the decision is correct or in error. You must evaluate the arguments to determine for yourself whether you believe the decision is correct or in error. If you understand the arguments in the appellants' brief to describe different assignments of error, use your understanding of the appellants' arguments.

Federal Telecommunications Law and Preemption

AT&T's brief argues that Skamania County should have concluded that federal telecommunications law preempted its hearing examiner appeal and that law preempts the Commission's authority to hear this appeal.

I recommend you familiarize yourself with this federal telecommunications law but given the state of the record and the briefing, I recommend that you address the preemption issue only if you would grant the appeal on one or more of the appellants' assignments of error. If you deny the appeal on the appellants' assignments of error, then you do not need to get into the complexities of the preemption argument. If you would grant the appeal on one or more of the appellants' assignments of error, you would then need to address AT&T's preemption arguments, which I can help you understand at the hearing.

There are several different references to the federal telecommunications law at issue in AT&T's argument and throughout the record. The term "Spectrum Act" refers to Title VI of the Middle Class Tax Refund and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 158. The term "Section 6409" is section 6409 of the Spectrum Act relating to review process and standards for certain limited modifications of existing wireless facilities (called "eligible facilities request"). Reference to "47 U.S.C. § 1455" is the title and section of the U.S. Code where section 6409 is codified. You won't need to read the above statutes. Instead, all relevant law in AT&T's argument is in the Federal

Communications Commission (FCC) regulations at 47 C.F.R. § 16100 (provided as part of your appeal packet)

My understanding of the record is that AT&T filed its application as an “eligible facilities request” pursuant to 47 C.F.R. § 16100. Section 16100 limits the type of information the reviewing authority may request (section 16100(c)(1)) and requires local governments to process applications within 60 days (the “shot clock”) (section 16100(c)(2)–(4)). If the application is not granted within that 60-day period, the applicant may assert the application is “deemed granted.” The Skamania County Community Development Department treated the application as an expedited review use pursuant to its National Scenic Area land use ordinance. The Community Development Department requested information required by its National Scenic Area land use ordinance, but which section 16100(c)(1) does not permit, and AT&T provided enough of that information such that the Community Development Department started its review. The record is not entirely clear when the 60-day review period ended, but there does not appear to be any dispute that the Community Development Department issued its decision before the 60-day period ended.

After the appellants filed their appeal to the Skamania County hearings examiner, AT&T participated in that appeal, arguing in its briefing to the hearings examiner that, “Applicant has provided the county with written notice that the application was deemed granted when the shot clock expired.” AR 296. The applicant also argued to the hearings examiner that, “The Request was deemed approved in January by virtue of the shot clock expiration.” AR 315. Section 16100(c)(4) states, “The deemed grant does not become effective until the applicant notifies the applicable reviewing authority in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.” I do not understand section 16100(c)(4) to mean an application is “deemed granted” simply by virtue of passing the 60th day. I did not find such a written deemed granted notice in the record other than the above cited briefs to the hearing examiner. The hearing examiner stated that she could not resolve claims under section 16100; instead, she resolved the appeal applying Skamania County’s National Scenic Area code.

My understanding of the record is that neither AT&T nor Skamania County have clearly treated the application as only an “eligible facilities request” or only as an expedited use under National Scenic Area standards. This makes the federal telecommunications law and claim of preemption factually and legally complex, and in this appeal to the Gorge Commission, neither the record nor the parties’ briefs fully develop the preemption issues. For example:

- In the hearing before the hearings examiner, the appellants attempted to argue to the hearings examiner that the facility does not qualify as an “eligible facilities request” because it violates conditions of approval in the original decision approving the tower in 2001, citing section 16100(b)(7)(vi). The argument is not clear whether it relates to the support tower or the concealment elements of the tower. Section 16100(b)(7)(vi) applies to non-stealth facilities, and AT&T is proposing a stealth facility (a fake fir tree). Thus, the applicable standard could be section 16100(b)(7)(v), which requires an analysis of whether the modifications would defeat the concealment elements of the structure. The record includes points and authorities from AT&T that the modified facility would not defeat the concealment elements, but Skamania County’s decision did not analyze section 16100(b)(7)(v) and AT&T does not address that standard in its brief in this appeal.

- AT&T argues that the facility was deemed approved, but I did not find in the record that AT&T provided notice to Skamania County that it considered the facility “deemed approved” as required by section 16100(c)(4).
- AT&T argues that the Skamania County hearings examiner did not have jurisdiction to hear the appeal and the Gorge Commission does not have jurisdiction to hear this appeal, citing section 16100(c)(5), which authorizes “Applicants and reviewing authorities may bring claims related to Section 6409(a) to any court of competent jurisdiction.” AT&T further argues that there is no provision for appeal by parties other than the applicant and reviewing agency. That is the situation here where an adjacent property owner, not AT&T or Skamania County, brought this appeal. AT&T cites to FCC Order No. 14-153 ¶ 236 (provided as part of your appeal packet). Paragraph 236 is on page 99 of the document. Paragraph 236 only addresses claims by applicants and reviewing authorities, giving three examples, all involving an applicant bringing a claim. The FCC order does not specify that other parties must also bring claims in court rather than an administrative proceeding. And despite its arguments, AT&T participated in the county’s appeal process and is participating in the current appeal to the Commission.

Group A – Appellants’ Brief pages 25–40

Assignment of Error 7 - Skamania County erred as a matter of law by accepting an incomplete application.

This assignment of error is stated on page 25 and encompasses all of assignments of error 1 through 6. I recommend you do not need to directly address assignment of error 7. Instead, resolve assignments of error 1 through 6. If you grant any of these individual assignments of error, then you would necessarily grant assignment of error 7 in whole or in part. If you deny all these individual assignments of error, then you would necessarily deny assignment of error 7.

Standard of Review for Assignments of Error 1–7

For all of assignments of error 1 through 6, the appellants argue that Skamania County erred as a matter of law by accepting an incomplete application. The appellants do not identify which of the Commission’s standards of review in Commission Rule 350-60-220 the Commission should apply.

In past appeals that raise the issue of an incomplete application, the Commission has applied two standards of review depending on the parties’ arguments. In *Friends of the Columbia Gorge v. Skamania County* [Eagle Ridge Dev. Corp.], CRGC No. S-99-01, at 8–9 (June 22, 2001), the Commission remanded the decision pursuant to the standard of review that requires a decision be supported by substantial evidence in the whole record. The Commission concluded in that case that there was not sufficient information in the record to support the factual determinations in the county’s decision. In another case, *Bacus v. Skamania County*, CRGC No. COA-S-04-01 (Aug. 10, 2004), the Commission applied the standard of review that requires a decision be flawed by procedural errors that prejudice the substantial rights of the appellants. The Commission concluded

that the application was missing some elements but did not remand on that basis because there was no prejudice and the County's decision otherwise complied with the development standards.²

Here, I recommend the Commission should apply the standard of review in 350-60-220(1)(f), which states, "The decision is not supported by substantial evidence in the whole record." In this standard of review, the question you must consider is whether the findings of fact in Skamania County's decision have support in the whole record. The findings must be material; do not base your decision on evidence that was not necessary for the decision. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), or "evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise," *Thurston County v. Cooper Pt. Ass'n*, 148 Wn. 2d 1, 57 P.3d 1156 (2002). In applying this standard of review, you must consider the whole record. An incomplete application may or may not result in a decision that is supported by substantial evidence elsewhere in the record, such as information that was gathered after the application was submitted. You should consider whether the evidence Skamania County relied on appears in the whole record, even if not in the application. If the evidence in the record differs, you should consider whether Skamania County explained the discrepancy and why it chose one piece of evidence over another.

I do not recommend you apply the procedural error standard of review in 350-60-220(1)(g) to the appellants' arguments about the completeness of the application because that standard of review requires the procedural error to prejudice the rights of the appellant. The expedited review procedures in the Management Plan and the Skamania County Code do not permit the appellants to receive notice of the application and provide comment. Thus, the appellants cannot demonstrate that they had a substantial right to the information in the application, and thus they were not prejudiced.

AT&T cited to the Washington Land Use Petition Act (LUPA) in response to the Appellants' arguments in assignments of error 1 through 7 about the 2001 permit first approving the tower. LUPA does not apply to National Scenic Area decisions. A LUPA statute, RCW 36.70C.030(1)(a)(ii), specifies that LUPA does not apply. The Clark County Superior Court recently concluded affirmed this exclusion from LUPA.

Assignment of Error 1 - The application was incomplete because it did not contain all required landowner signatures.

In a prior appeal decision, *GLW Ventures v. Skamania County*, Nos. COA-S-13-02 & COA-S-13-03 (May 13, 2014), the Gorge Commission concluded that the U.S. Forest Service, as a conservation easement holder, was a "property owner" as that term was used in the Skamania County land use ordinance, which requires that property owners must sign a land use application. The Gorge Commission's decision was limited to the facts of that appeal. In *GLW Ventures v. Skamania County*, No. 14-2-00071-7 (Skamania Cnty Super. Ct. Dec. 17, 2015), the Skamania County Superior Court

² The appellants cite to another Gorge Commission appeal decision, *Friends of the Columbia Gorge v. Skamania County* [Spiegel], CRGC No. S-96-02 (July 24, 1997). I recommend that decision does not address the same issues as the current appeal because the Commission's Final Opinion and Order did not address the completeness of the application.

affirmed the Gorge Commission's decision, but also concluded that the Forest Service is a "property owner" for all properties where it holds a conservation easement.

Note that this assignment of error involves a provision in the Skamania County Code that does not come from the Management Plan. See page 19 of the Gorge Commission's *GLW* appeal decision.

The application contained the signature of AT&T's representative, which is the lessee of the facility site. AT&T's application stated that all work would occur within the existing lease site. You need to decide whether the application also needed to contain the signature of the owner of the underlying land. My review of the record shows that Skamania County provided notice of the decision to the current owner, AR 430-31, and that the record does not reflect any challenge from the current landowner.

The appellants also raise an issue of whether the record contains substantial evidence of who owns the property. The application lists Schwarz as the owner, but the Skamania County property records list Stearns as the owner. The property changed owners (Schwarz to Stearns) in 2020. AR 276.

Assignment of Error 2 - *The application was incomplete because it contained different representations of the dimension between the existing facility and the appellants' property.*

Read the materials that the appellants cite and review the whole record. I recommend you determine whether Skamania County had sufficient information to know where the proposed development would occur.

Assignment of Error 3 - *The application was incomplete because it did not specify that the dwelling on the subject parcel is vacant, did not include a copy of a lease and easement, and did not describe wells, water, and irrigation to maintain required screening landscaping.*

Read the materials that the appellants cite and review the whole record. I recommend you determine whether Skamania County had sufficient information to conclude that the decision complied with the applicable standards, SCC § 22.06.140. The Community Development Department's decision under appeal is at AR 436. The decision does not require landscaping; I recommend you consider whether this decision must contain requirements to perform conditions of approval in the prior 2001 decision.

Assignment of Error 4 - *The application was incomplete because the subject parcel is located within 1000 feet of the Columbia River and the application did not include information relating to sensitive wildlife.*

Read the materials that the appellants cite and review the whole record. I recommend you determine whether Skamania County had sufficient information to conclude that the proposed development complied with the applicable expedited review standards at SCC § 22.06.140.A.1.d.ii (provided as part of your appeal packet) That provision requires that the application meet only one of several standards. Only one of the standards in that provision refers to additional application materials for wildlife sites within 1000 feet. Review the record to determine if the application satisfied any one of the other standards.

Assignment of Error 5 - The application was incomplete because it did not contain information demonstrating that the proposed modification is the minimum necessary.

Read the materials that the appellants cite and review the whole record. I recommend you determine whether Skamania County had sufficient information to conclude that the proposed modification was the minimum necessary. AT&T provided an engineer's letter at page 294 of the record opining on this point. You can also search the administrative record for the term "minimum" to help with your review of the record.

Assignment of Error 6 - The application was incomplete because it did not contain information required to analyze impacts to scenic, historic, recreation, and natural resources.

This assignment of error is divided into four parts, a through d. Each part suggests different standards of review apply in addition to whether the decision violates a provision of law and is prohibited as a matter of law. The appellants do not explain why these different standards of review apply. I recommend you apply the same standard of review as for assignments of error 1 through 5.

Regarding scenic resources, I understand the appellants' argument to be based on the standards for non-expedited review provisions. You should review the record to determine whether Skamania County's decision properly applied the scenic resource provisions in SCC § 22.06.140.A.1.a.

Regarding historic resources, the appellants argue that the existing dwelling on the subject parcel is older than 50 years. Thus, the appellants argue that Skamania County's conclusion that no historic survey was required was not based on substantial evidence. Skamania County's decision was based on a comment from the Forest Service archaeologist (AR 112-15). You should review those pages of the record and determine whether Skamania County's decision was based on substantial evidence.

Regarding recreation resources, the appellants argue that their property is an established recreation site. I recommend you review the record to determine whether Skamania County permissibly concluded that it is not an established recreation site. You can search the administrative record and transcript for the term "recreation" to help with your review.

Regarding natural resources, the appellants raise a similar argument as in assignment of error no. 4. If you deny or grant assignment of error no. 4, you should do the same for this part of assignment of error no. 6.

Group B – Appellants' Brief pages 40-48

Assignment of Error 15 - Skamania County erred as a matter of law by conducting an inadequate review.

This assignment of error is stated on page 40 and encompasses all of assignments of error 8 through 11. Again, I recommend you do not need to directly address assignment of error 15. Instead, resolve assignments of error 8 through 11. If you grant any of these individual assignments of error, then you would necessarily grant assignment of error 15 in whole or in part. If you deny all these individual assignments of error, then you would necessarily deny assignment of error 15.

Standards of Review

The appellants argue that one or all the following standards of review apply to assignments of error 8 through 11 and 15:

350-60-220(1)(d) – the decision was clearly erroneous or arbitrary and capricious;
350-60-220(1)(c) – the decision violates a provision of applicable law and is prohibited as a matter of law; and
350-60-220(1)(h) – the decision improperly construes applicable law.

The appellants do not explain how to apply these standards of review.

A decision is “clearly erroneous” when “the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed.” And “Generally speaking, if the local government has made an earnest attempt to comply with the law, has followed the procedures, and explained why it did what it did, we should not meddle.” *See Kittitas County v. E. Wash. Growth Mgmt. Hrgs. Bd.*, 172 Wn. 2d 144, 154, 186 (2011).

A decision is “arbitrary and capricious” when an agency relies on factors that the legislators (or in this case the Gorge Commission) has not intended the agency to consider; when an agency has entirely failed to consider an important aspect of the problem, when an agency has offered an explanation for its decision that runs counter to the evidence before the agency, or when the agency’s decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Manuf. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Note that these factors require more than just your disagreement with how a county applied the law. You must be able to explain how the county’s decision did not satisfy one or more of these factors.

A decision “violates a provision of applicable law and is prohibited as a matter of law” if an application could not be approved on remand. An example of decision that violates a provision of applicable law and is prohibited as a matter of law is a land division that does not meet the minimum parcel size specified in the code.

A decision “improperly construes the applicable law” when an appellant argues that code provision at issue is ambiguous and the county improperly interpreted it. The appellants do not argue that the Skamania County Code is ambiguous. I recommend this standard of review does not apply.

Assignment of Error 8 - Skamania County erred by concluding that it did not have jurisdiction to determine whether the existing tower complies with applicable standards and the past permit approving the tower.

The appellants argue that the Community Development Department decision did not address permit compliance issues. The appellants argue that these compliance issues prevent Skamania County from approving a modification to an “existing” utility facility because the definition of an existing use requires that the use be operated in accordance with past permits. The hearings examiner concluded she did not have jurisdiction to overturn the 2001 approval. AR 17 (conclusion 2). I recommend this is correct but the appellants also argue compliance issues with the 2001 permit that do not involve overturning that permit. The hearings examiner concluded that compliance issues must be handled through the code enforcement process. AR 18 (conclusion 3).

Consider whether the definition of an existing use makes compliance issues relevant to the current application. If you conclude they are relevant, then I recommend you review the record and determine whether there are compliance issues that would disqualify the facility from being considered an existing use. Page 294mm of the record contains the appellants' arguments about compliance with the original 2001 decision. Part of your consideration should be whether the current application would resolve those issues.

Assignment of Error 9³ - The existing tower does not comply with lot size, lease, and land division requirements in the Skamania County Code.

The appellants argue that the existing lease for the facility site violates Skamania County Code prohibitions on leases without a short plat. I understand the argument to suggest that the current decision, which relies on the existing lease, violates applicable law. The 2001 decision contains a condition of approval prohibiting a lease. AR 264 (condition 3). The record does not contain information about how the current lease complies with this condition of approval. The prohibition on a lease seems to be in Skamania County's non-National Scenic Area code. The Management Plan does not prohibit leases and does not recognize leased areas of land as a separate parcel. I recommend you treat this issue like the compliance issues in assignment of error 8.

Assignment of Error 10 - The existing tower does not comply with the setback requirement.

I recommend you treat this issue like the compliance issues in assignment of error 8.

Assignment of Error 11 - The existing tower does not comply with color, faux branches, and landscaping requirements of the past permit approving the tower.

I recommend you treat this issue like the compliance issues in assignment of error 8. I understand the application proposed to change the colors and faux branches, so compliance with the past conditions might not be relevant.

Group C – Appellants' Brief pages 48–50

Assignment of Error 14 - Skamania County committed procedural errors that prejudiced the substantial rights of appellants.

This assignment of error is stated on page 48 and encompasses all of assignments of error 12 and 13. Again, I recommend you do not need to directly address assignment of error 14. Instead, resolve assignments of error 12 and 13. If you grant any of these individual assignments of error, then you would necessarily grant assignment of error 14 in whole or in part. If you deny all these individual assignments of error, then you would necessarily deny assignment of error 14.

Standard of Review

³ Footnotes 17, 18, and 19 in the appellants' brief state, "Assignments of Error 9-11, 15." These seem to be appellants' notes that the arguments in section (B)(2) and subsections (B)(2)(a) and (b) of their brief relate to multiple assignments of error, nos. 9, 10, 11, and 15.

The appellants' brief does not identify the standard of review that they believe applies to assignments of error 12 through 14. Because they raise procedural claims relating to their appeal to the hearings examiner, I recommend the standard of review should be whether "The decision is flawed by procedural errors that prejudice the substantial rights of the appellants" in Commission Rule 350-60-220(1)(g).

Assignment of Error 12 - Skamania County erred by limiting the appellants' issues raised on appeal before the close of the record.

The appellants' brief does not specify what ruling they refer to. Unless the appellants clearly identify the ruling, I recommend you should deny this assignment of error. I can try to help you at the hearing if the appellants clarify this argument.

Assignment of Error 13 - Skamania County erred by allowing and granting the applicant's motions to dismiss and limit issues on appeal.

The appellants make their argument in about one-half of a page, so their argument is only marginally developed. They seem to argue that the portion of the hearing examiner's order denying AT&T's motion to dismiss that limits the issues on appeal was outside of her authority. In the Commission's *GLW* decision at pages 8-10, the Commission suggested that the hearings examiner had to allow arguments after filing a notice of appeal—a question of timing. Consider whether the hearings examiner excluded the appellants' issues in the current appeal because of timing or for other reasons.