

REPORT and DECISION of the SNOHOMISH COUNTY HEARING EXAMINER

DATE OF DECISION: October 19, 2005

APPLICANT/
LANDOWNER: VOICESTREAM WIRELESS/LARIMER'S CORNER

FILE NO.: 05 119666

TYPE OF REQUEST: Conditional Use Permit, setback Variance and Landscape Modification for a wireless communication facility including a 100 foot Puget Sound Energy (PSE) replacement pole, antenna, and associated equipment structures

DECISION (SUMMARY): Requests APPROVED subject to conditions

BASIC INFORMATION

GENERAL LOCATION: The property is located on PSE right-of-way and adjacent residence at 12002 46th Drive SW

ACREAGE: 0.18 acres

ZONING: R-9600

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation:	Urban Low Density Residential
Subarea Plan:	North Creek
Subarea Plan Designation:	Suburban (1-4 du/ac)

SELECTED AGENCY RECOMMENDATIONS:

Department of:

Planning and Development Services:	Approve subject to conditions
Public Works:	No recommendation at this time

INTRODUCTION

The applicant filed the Master Application on May 16, 2005. (Exhibit 1)

The Hearing Examiner (Examiner) made a site familiarization visit on September 28, 2005 in the afternoon.

The Department of Planning and Development Services (PDS) gave proper public notice of the open record hearing as required by the county code. (Exhibits 22, 23, 26, 27A and 27B)

A SEPA determination was made on August 24, 2005. (Exhibit 21) No appeal was filed.

The Examiner held an open record hearing on October 6, 2005, the 115th day of the 120-day decision making period. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearing.

PUBLIC HEARING

The public hearing commenced on October 6, 2005 at 3:02 p.m.

1. The Examiner indicated that he has read the PDS staff report, reviewed the file and viewed the area and therefore has a general idea of the particular request involved.
2. Mr. Gary Abrahams, representing the applicant appeared and summarized their request. He stated that he agrees with the PDS staff report and the conditions.
3. Mr. Paul Licther, PDS, had nothing further to add.
4. No one appeared in opposition to the request.

The hearing concluded at 3:12 p.m.

NOTE: Audio tapes of this hearing are available in the Office of the Hearing Examiner.

FINDINGS, CONCLUSIONS AND DECISION

FINDINGS:

1. The master list of Exhibits and Witnesses which is a part of this file and which exhibits were considered by the Examiner, is hereby made a part of this file, as if set forth in full herein.
2. The PDS staff report has correctly analyzed the nature of the application, the issues of concern, the application's consistency with adopted codes and policies and land use regulations, and the State Environmental Protection Act (SEPA) evaluation with its recommendation and conditions. This report is hereby adopted by the Examiner as if set forth in full herein.
3. The request is for approval of a conditional use permit, setback variance and a modification of landscaping requirements to locate a wireless telecommunications electromagnetic transmission and receiving utility facility on the subject property. There will be a base station. The proposed tower will replace an existing 80 foot tower and will consist of a 100-foot tall support structure for the base station, constructed to allow for the co-locations of up to two wireless carriers.
4. The General Policy Plan (GPP) Future Land Use Map (FLUM) designation is Rural Residential and the property is zoned R-9600. The proposed utility use is an allowed conditional use in the R-9600 zone.
5. Section 30.42 SCC provides standards regarding conditional use permits and upon a review of this request the proposed use meets those standards. The PDS staff has correctly reviewed the application of this request to Chapter 30.42C.100 SCC. The Examiner, therefore, concludes that this analysis, found on Pages 3 and 4 of the PDS staff report, Exhibit 38, is correct.

6. Chapter 30.25.040 SCC provides the standards for landscaping. This request is for modification from these landscaping requirements under Chapter 30.25.040 SCC. Upon a review of these Sections, this request will meet those standards, since the radio equipment will be placed within an existing utility shed that is behind a wooden fence on this property and cannot be seen from adjacent properties. Existing landscape will remain on the site with an additional 20-foot Type A landscaping to be placed at the northwest, west, southwest and southeast of the ground equipment.
7. Chapter 30.43B.100 SCC provides the standards for variances. A review of this request for a Variance from the 50-foot setback requirement of Chapter 30.23.050 SCC will allow the pole to be placed in the same location where there is already an existing utility pole. The PDS staff has shown the justification for the granting of the Variance on Pages 4 and 5 of their staff report (Exhibit 38).
8. The proposed use would not have any adverse affects on critical areas or wildlife habitat when reviewed under Chapter 30.62 SCC nor is a Habitat Management Plan required in this location along the road.
9. The Federal Aviation Administration (FAA) regulates the airspace of Snohomish County. However, the 100-foot tall replacement tower is under 200 feet in height and is located over 20,000 feet from an airport and is therefore deemed to not affect Part 77 airspace and does not require the filing of a Part 77 FAA form.
10. Exhibit 12 shows with very detailed pictures and graphics where the tower will be in the area, and how it will look. Clearly, there would be no adverse impacts upon views from the area as the communication facility will replace an already existing 80 foot pole.
11. With regard to radio frequency radiation exposure limits and CFR 47 § 24.52 RF Hazards (FCC Limits), the evidence in Exhibit 8, which is based on a worse case scenario, shows that this site complies with FCC rules. The ground level power density would have to be many times greater to reach the maximum public exposure limits established by the Federal Telecommunications Act. The County, under the terms of this Act, is therefore precluded from considering any further health impacts.
12. The request is consistent with Chapter 30.70.100 SCC and the elements and Comprehensive Plan or Subarea Plan elements adopted under Chapter 36.70A RCW.
13. Any Finding of Fact in this Report and Decision, which should be deemed a Conclusion, is hereby adopted as such.

CONCLUSIONS:

1. The Examiner having fully reviewed the PDS staff report, hereby adopts said staff report as properly setting forth the issues, the land use requests, consistency with the existing regulations, policies, principles, conditions and their effect upon the request. It is therefore hereby adopted by the Examiner as a conclusion as if set forth in full herein, in order to avoid needless repetition. There are no changes to the recommendations of the staff report.
2. The Department of Public Works had no comment.
3. The FAA indicates that there will not be an adverse impact on the airspace; and the non-ionizing electromagnetic exposure analysis and FCC certification as shown in Exhibit 8 will not violate any FCC regulations.

4. The request is in compliance with the Conditional Use Permit standards and the existing zoning classifications of R-9600 and is an allowed utility use. It is therefore consistent with the Growth Management Act Comprehensive Plan (GMACP) and the land use regulations of Snohomish County.
5. The request will provide additional and better service for telecommunications facilities in this area, which will therefore furnish better service to the citizens of Snohomish County.
6. The Variance request will allow a reasonable use of the land and no adverse affects were shown to result from this proposed request. Furthermore, the landscaping modification request is reasonable under these circumstances.

SCC 30.42C.200 requires execution and recording with the County Auditor of a Land Use Permit Binder (LUPB) in conjunction with the issuance of any conditional use permit, special use permit or variance.

SCC 30.42C.110 establishes procedures by which conditional use permit, special use permit or variance site development plans or permit conditions may be revised. The procedures allow minor site development plan revisions to be handled administratively by PDS but require open record hearing consideration of requests for major site development plan revisions and for changes to permit conditions.

Snohomish County Code provides a mechanism by which review of conditional use permits can occur. SCC 30.71.027 authorizes the PDS Director to initiate a review hearing on an existing conditional use permit. In the past, a review hearing has typically been convened when it appeared that a permit condition was not being fulfilled properly, that a permit condition needed to be revised in order to be effective, or that permit revocation should be considered.

7. The request should be approved subject to compliance by the applicant with the following Conditions:
 - A. The site plan(s) marked Exhibits No. 4A-4P, shall be the official approved development plan(s) for this project. Any discrepancy between the content of the official approved development plan(s) and the performance standards of the UDC SCC shall be resolved in favor of the standards contained within the UDC SCC. Revision of official approved development plan(s) is regulated by SCC 30.42c.110.
 - B. This conditional use permit is approved for the co-location for up to two wireless carriers. The co-location of additional carriers on this facility shall constitute a major revision to this conditional use permit as allowed by SCC 30.43A.105.
 - C. In the event that the FAA requires the tower/structure to be lighted or marked, all lighting and marking shall be done per the FAA's specifications. All lights shall be shielded from the ground below to the maximum allowed.
 - D. Nothing in the permit/approval shall excuse the applicant, owner, lessee, agent, successor or assigns from full compliance with any other federal, state or local statutes, ordinances or regulations applicable to this project. In particular, no clearing, grading, filling, construction or other physical alteration of the site may be undertaken prior to the issuance of the necessary permits for such activities.
8. Any Conclusion in this Report and Decision, which should be deemed a Finding of Fact, is hereby adopted as such.

DECISION:

The requests for a Conditional Use Permit, Variance and Landscape Modification for a Wireless Communications Facility for a 100-foot power pole are hereby APPROVED, SUBJECT TO COMPLIANCE by the applicant, with the CONDITIONS set forth in Conclusion 7, above.

Decision issued this 19th day of October, 2005.

Robert J. Backstein, Hearing Examiner

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

The Decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. However, reconsideration by the Examiner may also be sought by one or more Parties of Record. The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 30.72 SCC and the respective Examiner and Council Rules of Procedure.

Reconsideration

Any Party of Record may request reconsideration by the Examiner. A Petition for Reconsideration must be filed in writing with the Office of the Hearing Examiner, 2802 Wetmore Avenue, 2nd Floor, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before **October 31, 2005**. There is no fee for filing a Petition for Reconsideration. **“The petitioner for reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties of record on the date of filing.” [SCC 30.72.065]**

A Petition for Reconsideration does not have to be in a special form but must: contain the name, mailing address and daytime telephone number of the petitioner, together with the signature of the petitioner or of the petitioner’s attorney, if any; identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested; state the relief requested; and, where applicable, identify the specific nature of any newly discovered evidence and/or changes proposed by the applicant.

The grounds for seeking reconsideration are limited to the following:

- (a) The Hearing Examiner exceeded the Hearing Examiner’s jurisdiction;
- (b) The Hearing Examiner failed to follow the applicable procedure in reaching the Hearing Examiner’s decision;
- (c) The Hearing Examiner committed an error of law;
- (d) The Hearing Examiner’s findings, conclusions and/or conditions are not supported by the record;
- (e) New evidence which could not reasonably have been produced and which is material to the decision is discovered; or
- (f) The applicant proposed changes to the application in response to deficiencies identified in the decision.

Petitions for Reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.72.065. Please include the County file number in any correspondence regarding this case.

Appeal

An appeal to the County Council may be filed by any aggrieved Party of Record. Where the reconsideration process of SCC 30.72.065 has been invoked, no appeal may be filed until the reconsideration petition has been disposed of by the hearing examiner. An aggrieved party need not file a Petition for Reconsideration but may file an appeal directly to the County Council. If a Petition for Reconsideration is filed, issues subsequently raised by that party on appeal to the County Council shall be limited to those issues raised in the Petition for Reconsideration. Appeals shall be addressed to the Snohomish County Council but shall be filed in writing with the Department of Planning and Development Services, 5th Floor, County Administration Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S #604, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **November 3, 2005** and shall be accompanied by a filing fee in the amount of five hundred dollars (\$500.00); PROVIDED, that the filing fee shall not be charged to a department of the County or to other than the first appellant; and PROVIDED FURTHER, that the filing fee shall be refunded in any case where an appeal is dismissed without hearing because of untimely filing, lack of standing, lack of jurisdiction or other procedural defect. [SCC 30.72.070]

An appeal must contain the following items in order to be complete: a detailed statement of the grounds for appeal; a detailed statement of the facts upon which the appeal is based, including citations to specific Hearing Examiner Findings, Conclusions, exhibits or oral testimony; written arguments in support of the appeal; the name, mailing address and daytime telephone number of each appellant, together with the signature of at least one of the appellants or of the attorney for the appellant(s), if any; the name, mailing address, daytime telephone number and signature of the appellant's agent or representative, if any; and the required filing fee.

The grounds for filing an appeal shall be limited to the following:

- (a) The decision exceeded the Hearing Examiner's jurisdiction;
- (b) The Hearing Examiner failed to follow the applicable procedure in reaching his decision;
- (c) The Hearing Examiner committed an error of law; or
- (d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by substantial evidence in the record. [SCC 30.72.080]

Appeals will be processed and considered by the County Council pursuant to the provisions of Chapter 30.72 SCC. Please include the County file number in any correspondence regarding this case.

The Land Use Permit Binder, which must be executed and recorded as required by SCC 30.42C.200, will be provided by the department. The Binder should **not** be recorded until all reconsideration and/or appeal proceedings have been concluded and the permit has become effective.

Staff Distribution:

Department of Planning and Development Services: Paul Lichter

<p>The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.130.</p>
