

**BEFORE THE**  
**SNOHOMISH COUNTY HEARING EXAMINER**  
**DECISION of the DEPUTY HEARING EXAMINER**

In the Matter of the Application of )  
 )  
**CINGULAR WIRELESS** ) **FILE NO. 06 101582**  
 )  
Conditional Use Permit (CUP), landscape modification ) *Cingular at Everett 45<sup>th</sup> Avenue*  
and setback variance for the construction of a personal )  
wireless communications facility on a new PUD utility )  
pole at a substation site )

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DATE OF DECISION: May 2, 2006

DECISION (SUMMARY): The conditional use permit and landscape modification for a personal wireless communications facility are **CONDITIONALLY APPROVED** and the requested setback variance is dismissed as unnecessary.

**BASIC INFORMATION**

GENERAL LOCATION: The property is located at 4402 116<sup>th</sup> Street SE, Everett.  
(Hilton Lake PUD substation)

ZONING: R-9,600

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Urban Low Density Residential  
Subarea Plan: North Creek  
Subarea Plan Designation: Utility Installation

SELECTED AGENCY RECOMMENDATIONS:

Department of:  
Planning and Development Services: Approval subject to conditions  
Public Works: No objections or requirements

## **INTRODUCTION**

The applicant filed the Master Application on January 27, 2006. (Exhibit 1)

The Department of Planning and Development Services (PDS) gave proper public notice of the open record hearing as required by the county code. (Exhibits 15, 16 and 17)

A SEPA determination was made on March 9, 2006. (Exhibit 14) No appeal was filed.

The Examiner held an open record hearing on April 18, 2006, the 53<sup>rd</sup> 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 April 18, 2006 at 11:02 a.m.

1. The Examiner announced that he has read the PDS staff report, reviewed the file and had viewed the site pre-hearing to be generally apprised of the particular request involved.
2. The applicant, Cingular Wireless, was represented by Ron Meckler. Snohomish County was represented by Scott Whitcutt of the Department of Planning and Development Services.
3. No member of the public participated in this record by document or by testimony.

The hearing concluded at 11:31 a.m.

**NOTE:** For a complete record, an electronic recording of this hearing is available in the Office of the Hearing Examiner.

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.

Unless superseded herein, 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). That staff report is by this reference adopted by the Hearing Examiner.

## FINDINGS, CONCLUSIONS AND DECISION

### FINDINGS OF FACT

Based on all the evidence of record, the following findings of fact are entered.

1. The applicant, Michael Maher/Cingular Wireless, proposes to place a personal wireless communication facility (a cell phone tower) at the Hilton Lake PUD Substation at 4402 – 116<sup>th</sup> Street SE, Everett. The antennas will be placed on a new, 110-foot, PUD utility pole within the right-of-way between two existing PUD utility poles. The facility equipment cabinets will be within the fenced substation compound, which has perimeter fencing and landscaping already installed for screening. A power transmission line runs southeast to northwest through the easterly portion of the property.
2. The subject site is located three blocks north of the site of the applicant's existing personal wireless communication facility, which will be closed upon completion of the proposed facility. The applicant's representative, Ron Meckler, testified that there are few options for locating such facilities in the vicinity, which is nearly fully developed in residential uses. He testified that the PUD and Puget Sound Energy would not allow co-location on their existing poles but did agree to allow installation and use of a new pole.
3. The zoning of the vicinity is R-9,600. However, the General Policy Plan (GPP) Future Land Use Map (FLUM) designation is Rural Residential and the property is zoned R-5. The proposed utility use is an allowed conditional use in the R-5 zone.
4. 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.
5. 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.
6. 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.
7. With regard to radio frequency radiation exposure limits and CFR 47 § 24.52 RF Hazards (FCC Limits), the ground level power density would have to be many times greater (a thousand 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.
8. There are no critical areas associated with the subject site.
9. Any finding of fact in this decision which should be deemed a conclusion is hereby adopted as such.

## **CONCLUSIONS OF LAW**

Based on the findings of fact entered above, the following conclusions of law are entered.

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 request is in compliance with the Conditional Use Permit standards and the existing zoning classifications of R-5 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. Because the facility is associated with an existing utility substation and is not a traditional building, no setback variance is necessary.
3. 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.
4. SCC 30.22.110 allows "Electromagnetic Transmission and Receiving Facilities" in the R-5 District as a conditional use. The subject site is so zoned. The County Council at that Code Section also allows such a facility as a conditional use in the following zones: R-9,600, R-8,400, R-7,200, T, LDMR, MR, NBFS, RD, RRT-10, R-5 (as noted above), RB, RFS, F, F&R, A-10, MC, SA-1, RC, RU, R-20,000, R12,000 and WFB. In every other zoning district, such facility is permitted outright. In no zoning district is such facility prohibited. In view of such broad authorization for the location of "cell towers" by the County Council, there is a rebuttable presumption that the County Council intended to permit the tower height typically needed in order for such a facility to meet its intended purpose. By logical extension, the County Council is presumed to have known that such typical heights for the facilities would cause them to be visible. Thus, visibility alone is not a basis for denial of an application.
5. The request should be approved subject to compliance by the applicant with the following conditions:

## **CONDITIONS**

- A. The site plan(s) marked Exhibits No. 3D-3H shall be the official approved plan(s) for this project. Any discrepancy between the content of the official approved development plan(s) and the performance standards of the SCC shall be resolved in favor of the standards contained within the SCC. Revision of official approved development plan(s) is regulated by SCC 30.42C.110.
- B. All exposed antennas, coax, and mounting hardware shall be painted a neutral color to match the exterior finish of the utility pole.
- 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. The facility operator shall conduct an annual safety inspection and file a report with the county within 60 days of the inspection pursuant to Chapter 30.28A.140(1).

- E. The recipient of any conditional use permit and/or variance shall file a land use permit binder on a form provided by the department (Planning and Development Services) with the county auditor prior to any of the following: initiation of any further site work, issuance of any development/construction permits by the county, or occupancy/use of the subject property or buildings thereon for the use or activity authorized. The binder shall serve both as acknowledgement of and agreement to abide by the terms and conditions of the conditional use permit and as a notice to prospective purchasers of the existence of the permit. (SCC 30.42C.200)

Nothing in this permit/approval excuses the applicant, owner, lessee, agent, successor or assigns from compliance with any other federal, state or local statutes, ordinances or regulations applicable to this project.

6. Any conclusion in this decision which should be deemed a finding of fact is hereby adopted as such.

### **DECISION**

Based on the findings of fact and conclusions of law entered above, the decision of the Hearing Examiner on the application is as follows:

The requests for a conditional use permit, and landscape modification for a wireless communications facility are hereby **CONDITIONALLY APPROVED**, subject to compliance by the applicant with the conditions set forth in Conclusion 5 above. No setback variance is required.

Decision issued this 2<sup>nd</sup> day of May, 2006.

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Ed Good, Deputy Hearing Examiner

<b>EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES</b>
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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, 2<sup>nd</sup> Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before **MAY 12, 2006**. 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, 2<sup>nd</sup> Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S #604, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **MAY 16, 2006** 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 the case.

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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.

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Staff Distribution:

Department of Planning and Development Services: Erik Olson

<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>
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