

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER

DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of)
) **FILE NO. 06 128004 LU**
T-MOBILE USA)
)
Conditional use permit and landscape modification)
for a wireless communications facility consisting of)
150 foot monopole with three panel antennas and a)
160 square foot equipment with building)

DATE OF DECISION: November 3, 2006

PLAT/PROJECT NAME: *T-Mobile / Sisco Heights*

DECISION (SUMMARY): The conditional use permit application for a 150-foot high monopole wireless communication facility, equipment building and landscape modification is **CONDITIONALLY APPROVED.**

BASIC INFORMATION

GENERAL LOCATION: The property is located at 8130 Wade Road, Arlington, Washington.

ACREAGE: 5.2 acres

ZONING: R-5

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Rural Residential-5

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 June 12, 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 18, 19 and 20)

A SEPA determination was made on September 12, 2006. (Exhibit 17) No appeal was filed.

The Examiner held an open record hearing on October 25, 2006, the 72nd 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 25, 2006 at 10:02 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, T-Mobile USA, was represented by Gary Abrahams. Snohomish County was represented by Paul Lichter of the Department of Planning and Development Services.
3. No member of the general public attended the hearing. Residents of two vicinity households submitted pre-hearing letters of opposition: Brian Laine (Exhibit 22) and Wendy Mauch (Exhibit 21). Those concerns are examined below herein.

The hearing concluded at 10:34 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 Policy Act (SEPA). That staff report is by this reference adopted by the Hearing Examiner with a condition added to assure that fencing is provided.

FINDINGS, CONCLUSIONS AND DECISION

FINDINGS OF FACT

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

1. The applicant, T-Mobile USA, filed an application to place a wireless communication facility (a cell phone tower) at 8130 Wade Road in Arlington to serve the Sisco Heights area. The project includes a monopole of 150-foot height with three flush-mounted antennas, a 160-square-foot equipment building for radio cabinets, and an access road of 409 square feet. Total impervious surface of the facility will be 3% of the 5.2-acre subject site.
2. The applicant submitted a detailed application packet (Exhibit 8) on June 12, 2006 and additional material (Exhibit 28) at the hearing on October 25, 2006 (Exhibit 8). The tower will be painted dark green to best blend visually into the mature, second-growth forest. Photo-simulations and testimony show that the upper one-quarter to one-third of the monopole will be above the tallest trees in the vicinity. The originally proposed location of the facility within the subject site was found to be a wetland. Thus, the proposal was amended to move the facility out of the wetland area. The final proposal is for the facility to be in the northeast corner of the subject site, 83 feet from the eastern property line, 58 feet from the north property line and with one garage but no occupied residence within 150 feet of the monopole.
3. Approximately 200 feet north of the subject site is the home of the family of Wendy Mauch, who by letter of June 29, 2006 (Exhibit 21) expresses opposition based on her view of the monopole "...looming over the trees..." at a height impossible to alleviate by any hedge or fence. She resents having to "sell" the presence of the monopole to potential buyers of her home. She points out that the monopole will be visible from every angle in her yard, from which the only view is of the natural tree line. She notes that her family's cell phones through Verizon operate well from inside or outside their home and, thus, asks why T-Mobile does not rent space from an existing cell tower rather than constructing the proposed monopole. (The applicable Snohomish County Code Section 30.28A.080 encourages co-location and, at SCC 30.28A.090, requires good faith cooperation between providers to achieve co-location.)
4. Brian Laine owns land north and south of Wade Road abutting the west side of 81st Avenue NE. He points out that the view most people on Wade Road will have of the monopole is the view from the west. He asks if the record contains any depiction of that view from the west; i.e., looking eastward. There is a photo-simulation in the record of the view from Wade Road looking east (Exhibit 28). The surrounding trees of approximately 90-foot height provide abundant, although not total, visual relief. A Native Vegetation Retention Area (NVRA) is intended to permanently maintain the trees on the project site.
5. T-Mobile seeks a landscaping modification based on the rationale that the existing, natural forest provides better visual buffering than any landscaping required by the County Code could achieve. There is no contrary argument in the record. The Examiner finds as fact that the modification should be granted.
6. T-Mobile also asks for waiver of the requirement to fence the subject facility. (See SCC 30.28A.150(5)) It is true that fencing is not required for purposes of visual softening in this instance, given the surrounding forest. However, visual shielding is not the only reason to require fencing of a personal wireless telecommunications facility. Young people might be tempted to climb the monopole (in this case, out of sight in dense forest) on a dare as part of the maturation journey we have each experienced in our youth. The fact that danger from radio frequency electromagnetic fields increases to hazardous levels nearer the top of the monopole near the antennas is undisputed. Specifically, the applicant's report, *NON-IONIZING ELECTROMAGNETIC EXPOSURE ANALYSIS & ENGINEERING CERTIFICATION* (Exhibit 7), notes that the persons at ground level will have radio frequency exposure much lower than the Maximum Power Exposure (MPE) set by the Federal Communications Commission. Significantly, however, the same report adds:

“Only trained persons will be allowed to climb the monopole for maintenance operations. T-Mobile and/or its contractors will provide training to make the employees fully aware of the potential for RF exposure...and they can exercise control over their exposure....”

Local youths have no such training. Absent evidence that it is impossible to climb the monopole, the Examiner sees no reason of record to waive the fencing requirement of SCC 30.28A.150(5). (See Condition 7-C below.)

7. The General Policy Plan (GPP) Future Land Use Map (FLUM) designation is Rural Residential and the property is zoned R-5. The proposed use is an allowed conditional use in the R-5 zone.
8. 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.
9. 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.
10. 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.
11. 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.
2. The request is in compliance with the Conditional Use Permit standards and the existing zoning classifications of R-5 and is an allowed use. It is therefore consistent with the Growth Management Act Comprehensive Plan (GMACP) and the land use regulations of Snohomish County. Specifically, the proposal is consistent with Objectives UT 5.A, 5.B1 and 5.D
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 new Snohomish County regulations for wireless communications facilities at SCC 30.28A are consistent with the “least intrusive” standard adopted by the Ninth Circuit in 2005 in METROPCS, INC. v. City and County of San Francisco, 400 F.3d 715 (9th Cir.2005), in which the United States Court of Appeals held that that standard allows for:

“...meaningful comparison of alternative sites before the siting application process is needlessly repeated. It also gives providers an incentive to choose the least intrusive site in their first siting applications, and it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials.”

That standard has been met herein, as shown by the findings of fact above.

6. The applicable regulatory provisions in the instant matter are at Snohomish County Code Chapters 30.28A. The applicant has painstakingly provided a 21-page analysis (Exhibit 18) of how this proposal meets the applicable regulatory decisional criteria of SCC 30.28A and the conditional use permit criteria (SCC 30.42C), covering a gap in service, impact on bird species, setbacks, landscaping and screening, location priorities, co-location, siting criteria, propagation maps, design criteria and facility maintenance. That document is a model worthy of replication by future applicants for wireless communication facilities under the recent SCC 30.28A regulations.
7. It is concluded as a matter of law that the decision herein is consistent with prior Hearing Examiner decisions in Snohomish County in factually similar settings and under substantially similar regulatory provisions.
8. 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 with the following conditions:

CONDITIONS:

- A. The site plan(s) marked Exhibit 3A-3S shall be the official approved plan(s) for this project. Any discrepancy between the content of the official approved site 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 site plan(s) is regulated by SCC 30.42C.110.

- B. The co-location of additional carriers on this facility, as regulated by SCC 30.28A, and for whose antennas do not pose a significantly greater visual appearance than those shown on the approved plans, shall constitute a minor revision to this conditional use permit as allowed by SCC 30.42C.110.
- C. Fencing shall be installed consistent with the requirements of SCC 30.28A.150(5).
- D. All exposed antennas, coax, and mounting hardware shall be factory painted a color similar to, and no lighter than, Sherwin Williams “Black Forest- #SW2238” or Valspar “Deepest Night-#802A-4”.
- E. 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.
- F. The applicant shall file with the County Auditor the required Land Use Permit Binder (LUPB) on a form provided by the Department.
- G. The recipient of any conditional use permit 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.

Decision issued this 3rd day of November, 2006.

Ed Good, Deputy 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, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before **NOVEMBER 13, 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, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S #604, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **NOVEMBER 17, 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.

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: 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>
