

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER

DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of)
)
VOICESTREAM WIRELESS/T-MOBILE) **FILE NO. 05 117256**
)
Conditional Use Permit (CUP) and Landscape)
Modification for a wireless communication facility)
consisting of a 165 foot monopole and associated)
ground equipment)

DATE OF DECISION: March 1, 2006

PROPERTY OWNER: Marjorie Williams

DECISION (SUMMARY): The application is **CONDITIONALLY APPROVED.**

BASIC INFORMATION

LOCATION: Access to the subject property is from the neighboring property located at 15712 88th Street SE, Snohomish, Washington.

ACREAGE: Not applicable to leased tower site.

ZONING: R-5

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Rural Residential-5
Pre-GMA Subarea Plan: Snohomish/Lake Stevens
Subarea Plan Designation: Rural-5 Acre

SELECTED AGENCY RECOMMENDATIONS:

Department of:
Planning and Development Services: Approval subject to conditions

INTRODUCTION

The applicant filed the Master Application on March 28, 2005. (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 22, 23 and 24)

A SEPA determination was made on December 20, 2005. (Exhibit 21) No appeal was filed.

The Examiner held an open record hearing on February 14, 2006, the 133rd 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 February 14, 2006 at 1:04 p.m.

1. The Examiner stated that he had read the PDS staff report, reviewed the file and viewed the area and therefore had a general idea of the particular request involved.
2. The applicant, Voicestream PCS III Corporation, (Voicestream) was represented by Gary Abrahams. Snohomish County was represented by Erik Olson of the Department of Planning & Community Development Services (PDS). At least 41 households submitted letters opposing the monopole. Those letters are in the record as exhibits. Key spokespersons in opposition to the application were Natasha Petroff and Jeffrey Sholl.

The hearing spanned about three hours and concluded at 4:15 p.m.

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

FINDINGS, CONCLUSIONS AND DECISION

FINDINGS OF FACT

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

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 in its report to the Hearing Examiner analyzed the nature of the application, the issues of concern, the application's consistency with adopted plans, policies, land use regulations and the State Environmental Policy Act (SEPA). That report is adopted by the Examiner as if set forth in full herein except as specifically stated otherwise.

3. The request is for a conditional use permit (CUP) to and a landscape modification in order to construct a wireless communication facility consisting of a 145-foot high monopole, antennas and associated ground equipment located at 15712 – 88th Street SE, Snohomish. The height originally proposed was 165 feet but that was lowered to 145 feet as a compromise to reduce visual impact in response to concerns expressed at a community meeting hosted by the applicant on April 26, 2005. Further, the “top hat” array was deleted and replaced with flush mounted antennas which, on the monopole painted dark green, is intended also to reduce visual impact. Further, in response to a neighbor’s concerns about noise and aesthetics, the applicant removed the generator and propane tank and fencing from the project and placed the radio cabinets into a garden-type equipment shelter building on the west side of the subject site, as far from abutting residences as possible to reduce detectable noise. Noise will be 18 dBA at the north property line 80 feet from the monopole base. Landscaping has been added along the north side of the subject site. Balloon tests of visibility are documented by photographs in the record for comparison with similar photographs submitted by opponents. The Examiner finds neither set of photographs to be compelling as to what the facility will actually look like and finds the tower’s visual presence so similar in the competing sets of photographs as to give the two sets equal weight.
4. Opponents argue that their experience as residents of the vicinity is that cell phone service is adequate throughout the community. Thus, they challenge the need for the tower. The applicant’s response is both technical, through its engineer’s testimony, and practical, in pointing out persuasively that the applicant does not build unneeded sites.
5. Opponents assert that alternative sites, including electrical distribution line towers, are available in the vicinity and would soften the impact of the project if used instead of the subject site. The applicant responds that the Bonneville Power Administration (BPA) is not willing to host these antennas at this time. Opponent Jeffrey Sholl argued at hearing that BPA’s moratorium on antenna co-locations is no longer in effect. He attempted to bolster that argument with an improper, post-hearing, ex parte submittal to the Examiner by e-mail of February 21, 2006 (Exhibit 77-A), which the Examiner must ignore. If co-location on a BPA tower would serve Voicestream’s needs and is available, upon proper inquiry or application by Voicestream, this record might be re-opened upon proper petition and for good cause shown.
6. Through the testimony and written report of a trained and experienced property appraiser, opponents point out that the project will cause a drop in property values ranging from 5% to 10% with the most impact on properties close to the tower and on the Campfield vacant lot. That degree of loss, alone, is not sufficient reason to deny any application per se.
7. The subject property is designated R-5 which allows the proposed use. A CUP may be granted in this zone if the requirements for a CUP are met. The request meets the requirements for the issuance of a CUP under Chapter 30.42C SCC, in particular the decision criteria therein for a CUP as set forth in SCC 30.42C.100. A review of these CUP standards with the request indicates that the standards are met, as discussed in the staff report.
8. The subject vicinity is lovely, rolling countryside of territorial views, woods, fields and open space. In that setting, the tower as proposed has acceptable impact but not if the tower were to be lighted. If it becomes necessary to light the structure in the future, that will not be consistent with the intent of this conditional use permit and might support a revocation proceeding. 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.

9. The request is consistent with Section 30.70.100 SCC (Section 32.50.100 SCC), which requires, pursuant to RCW 36.70B.040, that all project permit applications be consistent with the GMACP, and GMA-based county codes. The General Policy Plan's Future Land Use Map designates the subject site Rural Residential and the property is zoned R-5. The proposal was considered a utility in the law applicable to this application and, as such, was allowed as a conditional use in R-5 zoning.
10. Chapter 30.25.040 SCC provides the standards for landscaping. The request for modification herein seeks recognition that the current trees provide better visual buffering than the referenced landscape code would provide. The additional plantings proposed on the north side of the subject site are acceptable in lieu of strict adherence to the code.
11. The request will not generate impacts to the County's park system or the school system.
12. There are no critical areas within 100-feet of any proposed development and therefore this project is not subject to the requirements of Chapter 30.62 SCC.
13. Any finding of fact in this decision which should be deemed a conclusion is hereby adopted as such.

CONCLUSIONS OF LAW

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 subject site and the surrounding area is zoned R-5. 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.
3. The request for a wireless communication facility should be approved subject to compliance by the applicant with the following conditions:

CONDITIONS:

- A. The site plan(s) marked Exhibits 10C, D, F, L and M, 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. The tower and all proposed and future antenna/attachments shall be FACTORY painted a color that is selected by the tower owner and is similar to and no lighter than, Sherwin Williams Black Forest #SW2238 or Valspar Deepest Night #802A-4 and shall be completed prior to the final of the building permit and/or activation of the facility. Further, no array known as a “top hat” shall be installed on the subject monopole by the applicant or any co-locators.
- C. All equipment i.e. fans, A/C packs, exhaust tubes etc. either alone or attached to an equipment building will be placed directing any noise generating features to the West or South.
- D. In the event that the FAA requires the tower/structure to be lighted or marked, that lighting will not be consistent with the scope or intent of this permit and may be the basis for a revocation proceeding pursuant to SCC 30.71.027.
- E. The landscaping as shown on the approved plans, Exhibit 10L and M, shall be installed prior to the final of the tower permit and or the initialization of the facility, whichever comes first.
- F. 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 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.

- 4. Any conclusion in this report and 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 request for a Conditional use permit and landscape modification for a wireless communication facility are hereby **CONDITIONALLY APPROVED, SUBJECT TO COMPLIANCE** by the applicant, with the **CONDITIONS** set forth in Conclusion 3, above.

Decision issued this 1st day of March, 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 **MARCH 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 **MARCH 15, 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

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| 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. |
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