

REPORT and DECISION of the SNOHOMISH COUNTY HEARING EXAMINER

DATE OF DECISION: August 18, 2005

APPLICANT: VoiceStream Wireless

LANDOWNER: William Sosinsky, Windandtide Community

FILE NO.: 05 117348

TYPE OF REQUEST: Conditional Use Permit and Landscape Modification for a Wireless Communications Facility consisting of a 120-foot monopole, three flush-mount antennas and a 160 square foot equipment shed.

DECISION (SUMMARY): Approved subject to Conditions

BASIC INFORMATION

GENERAL LOCATION: The property is located at 12604 Scenic Drive, Edmonds, Washington

ACREAGE: 1.57 acres

ZONING: Residential-9,600 (R-9,600)

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Urban Low Density Residential (4-6 du/ac)
Subarea Plan: Paine Field
Subarea Plan Designation: Urban (4-6 du/ac)

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 March 29, 2005. (Exhibit 1)

The Hearing Examiner (Examiner) made a site familiarization visit on July 21, 2005 in the morning.

The Department of Planning and Development Services (PDS) gave proper public notice of the open record hearing as required by the county code. (Exhibits 13, 14 and 15)

A SEPA determination was made on June 6, 2005. (Exhibit 12) No appeal was filed.

The Examiner held an open record hearing on August 3, 2005, the 50th 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 August 3, 2005 at 11:00 a.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, applicant's representative, appeared and stated that they had looked around for several locations and finally decided that the community park is a better location than the previous one. He stated there will be a 120-foot monopole painted dark green and no new landscaping is proposed because of the existing landscaping. He stated they agree with the PDS staff report and the conditions as they are revised. (The revised conditions are set forth in Exhibit 28)
3. Mr. Darryl Eastin, PDS, appeared and stated submitted the revised conditions and corrected certain dates in the staff report.
4. Mr. Gary Schwertley appeared. He submitted a letter of concerns regarding this matter. He believes the restrictions prohibit this use and he is the nearest neighbor to the antenna. He stated that the Windandtide has opposed this use in other locations. He stated he was concerned about loss of property value and health concerns. He stated he is a member of the Windandtide Community that voted to allow this use and he believes it was in order to make money.
5. Mr. Nick Peak, secretary for the Windandtide Community, appeared and stated that Windandtide has challenged efforts to install monopoles in the past. However, it was their intent to provide the least impact to the neighborhood and they had voted overwhelmingly to allow it to proceed.
6. Mr. Abrahams concluded by stating that the Examiner can limit the number of antennas on one pole. He indicated that they have not found any property value loss due to these poles in their passed activities. He stated they prefer to buy where there is cellular coverage, if they can. He stated the CCNR's do not prohibit this use.

The hearing concluded at 11:37 a.m.

NOTE: The above information reflects the information submitted to the Examiner summarizing the statements that were made at the hearing. However, for a full and complete record, verbatim audio tapes of these hearings 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 (CUP) and a Modification of Landscaping requirements to locate a Wireless Telecommunications Electromagnetic Transmission and Receiving Utility Facility on the subject property. This is a Personal Cellular Service base station for wireless telecommunication service on the Windandtide Community Park (private) property, which contains a 704 square foot covered picnic shelter structure, asphalt play area, children's play area and grass playfield located in the lowest west portion of the private park. The monopole will be located in the northeast portion of the site and approximately 78 feet from the north property line and 67 from the east property line adjacent to Scenic Drive. There will be a base station consisting of a 120-foot tall support structure (monopole) constructed to allow for the co-location of up to two wireless carriers.
4. One letter of concern was received from Gary R. Schwertley indicating because of restrictive covenants, it would prevent any structure from being constructed. Mr. William Sosinsky, the Association President of Windandtide Community Club, stated that there are no covenants that apply to the community park site which would prevent the installation of the proposed wireless communication facility and the Community Club agrees with the leasing of the property for the proposed use.
5. The validity of whether of not restrictive convenience applies or does not apply must be determined by a court of law and it is not a matter for determination or consideration by the Hearing Examiner.
6. 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 4-5 and 7-10 of the PDS staff report (Exhibit 26), is correct.
7. 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 existing landscape will remain on the site with the location in a community park area.
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. The 120-foot tall tower is under 200 feet in height, but, it is located within 20,000 feet from an airport (Paine Field). However, the monopole did not require the filing of a Part 77 FAA form 7460-1 because the elevation at the tip on the monopole (516 feet above sea level) will be approximately 93 feet below the elevation of Paine Field runways. (609 feet above sea level)
10. Exhibit 7 shows with very detailed pictures and graphics where the tower will be in the area, and how it will look.
11. With regard to radio frequency radiation exposure limits and CFR 47 § 24.52 RF Hazards (FCC Limits), the evidence in Exhibit 3, 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. The one person in opposition and voicing concerns, while a member of the Windandtide Community Club, is concerned because his residence is the closest to the antenna and he believes he will be most affected by it. The Examiner has placed a condition so that his concerns will be properly treated and reviewed at the time of the final preparations for the construction of the facility.
14. 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, except for supplemental conditions.
2. The Department of Public Works had no concerns.
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 2 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-9,600 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. There is presently existing landscaping which will allow the waiver of the landscaping requirements. However, the Examiner has added a condition to ensure that all the protection which can be given to Mr. Gary Schwertley will be considered.
7. However, the Examiner does not find that sufficient evidence has been presented such as to justify denial of the request and it's over all benefit and location to the area.
8. The request should be approved subject to compliance by the applicant with the following Conditions:

CONDITIONS:

- A. The site plan(s) marked Exhibit 6, 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 including VoiceStream PCS. 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. The co-location of additional carriers on this facility 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 30.43A.105.
- D. The monopole 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.
- E. Any future antenna must be of the same style, approximate size, mounting configuration and be painted the same color as those proposed for this application.
- F. 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 southwest.
- G. 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.

Prior to the Final of the Building Permit and/or Activation of the Facility:

- H. The landscaping, as shown on the approved plans, shall be installed prior to the final of the tower permit and or the initialization of the facility, whichever comes first.
- I. 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.

Examiner's Condition:

- J. The applicant, prior to completion of final plans, should meet with Mr. Schwertley to ensure that all is or will be done to provide protection to his property either by location or additional landscaping being done. If there is any dispute on these issues the matter may be brought back to the Examiner for resolution.

- 9. 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 and Landscape Modification for a Wireless Communications Facility consisting of a 120-foot monopole, three flush mounted antennas and 160 square foot equipment shed are hereby APPROVED, SUBJECT TO COMPLIANCE by the applicant, with the CONDITIONS set forth in Conclusion 8, above.

Decision issued this 18th day of August, 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 **AUGUST 29, 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 **SEPTEMBER 1, 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: Darryl Eastin

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.