

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER

DECISION and ORDER of the DEPUTY HEARING EXAMINER

In the Matter of the Application of)	
)	
VOICESTREAM WIRELESS)	
)	FILE NO. 05 117450
for a Conditional Use Permit and Landscape)	
Modification for a Wireless Communications Facility)	
)	
and)	
)	
Appeal of JOHN & LORI CARTER, et al. from)	
a SEPA threshold determination of nonsignificance.)	

DATE OF DECISION: February 2, 2006

PLAT/PROJECT NAME: *Echo Lake / Osborn*

DECISION (SUMMARY): The appeal is **DENIED** and the conditional use application is **DENIED**.

BASIC INFORMATION

GENERAL LOCATION: The property is located at 23320 131st Avenue SE, Snohomish Washington.

ACREAGE: 9.78 acres

ZONING: Rural 5-Acre (R-5)

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Rural Residential (1 du/ 5 ac)

Subarea Plan: Cathcart-Maltby-Clearview

Subarea Plan Designation: Rural (1 du/2.3 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 30, 2005. (Exhibits 9A-C)

The Department of Planning and Development Services (PDS) gave proper public notice of the open record hearing as required by the county code. (Exhibits 33, 34 and 35)

A SEPA determination was made on October 21, 2005. (Exhibit 32) An appeal (Exhibit 1) was timely filed.

The Examiner held an open record hearing on January 18, 2006, the 225th 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 January 18, 2006 at 12:02 p.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, VoiceStream, was represented by Steve Caplan. Appellants, John and Lori Carter, appeared on their own behalf. Snohomish County was represented by Tom Barnett of the Department of Planning and Development Services.

The hearing concluded at 4:12 p.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Unless superseded herein, the PDS staff report has correctly analyzed the nature of the application, the issues of concern, the application's consistency with adopted codes and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 of the evidence of record, the following findings of fact are entered applicable to the underlying conditional use application and to the appeal from the SEPA threshold determination of nonsignificance.

1. The applicant, VoiceStream Wireless (herein "Voicestream), filed an application for a zoning conditional use permit in order to construct a 150-foot tall monopole tower to hold an array of up to 24 microwave antennas for cellular telephones. (Voicestream points out that it has an agreement with Verizon to share towers.) The subject site is addressed 23320 – 131st Avenue SE, Snohomish, in the Echo Lake vicinity.
2. Appellants John and Lori Carter own a residence 58 feet from the base of the proposed tower and timely filed an appeal from an environmental determination of nonsignificance
3. The applicant proposes to paint the tower a dark green/black color approximating the color of the mature trees in and around the subject site and to retain most of the significant trees surrounding the proposed tower. The tower does not require aviation warning lights. The surrounding trees are approximately the height of the proposed tower and, as a result, tend to reduce the view of the tower and antenna array for drivers on vicinity roadways. No emergency generator will be on the site so no noise will be produced.
4. Homes from which the tower is in the viewscape include three homes to the south several hundred feet on 234th Street SE immediately west of 131st Avenue SE. One of those is the residence of Gene Neimasz, who argues that the proposed tower's visual intrusion is significant in the Echo Lake community, where even electrical lines have been buried in order to preserve the wooded, rural ambiance. Although the back of his home in the Sutton Woods neighborhood faces the proposed tower, he testifies that the backyard is where his family spends most of the time when outdoors. The barbeque is in the back.
5. Other homeowners affected by the proposed tower are those directly across 131st Avenue SE from the tower site. Those homes orient to Echo Lake and not toward the proposed tower but, as lakefront properties with unimpeded, high-amenity forest views, they are prized for the surrounding milieu which would include the proposed towers.
6. The home most impacted by the proposed tower is the one owned by appellants John and Lori Carter which they rent to tenants as a source of supplemental income. The proposed facility is 58 feet from that rental home. That home's master bedroom windows and living room windows face the proposed tower.
7. Appellants brief (Exhibit 53) argues that the proposed tower will (1) threaten wildlife, (2) interfere with homes' electronics, (3) cause economic damage and (4) place a home in the proposed tower's fall zone. None of those are persuasive rationale except the fall zone. As to that, the appellants do not convince the Examiner that the 150-foot tower will fall, striking the appellants rental located only 58 feet from the tower's base. Appellants are persuasive, however, that some potential renters will have a perception of danger due to the proximity of the tower to the windows of the rental.

8. The applicant points out (Exhibit 52) that economic damage is not a SEPA issue, that electronics will not be adversely impacted, nor will streams and wildlife, and the fall zone meets all required safety and building standards. Based on the evidence of record, the Hearing Examiner concurs with each of those points and so finds as fact.
9. As to the zoning conditional use, the applicant points out that the application meets the Comprehensive Plan's Objective 5.D, which urges consistency between utility expansion plans and planned land use patterns. The applicant asserts that the proposed tower would provide better connectivity in the Echo Lake area in response to anticipated growth in traffic and population in this vicinity. Thus, VoiceStream asserts that this proposal meets the Comprehensive Plan, as required for any conditional use by SCC 30.42C.100(1).
10. VoiceStream also points out its efforts to collocate on a tower at Williams Pipeline station consistent with Comprehensive Plan Policy 5.A.1. Those efforts failed but the proposed tower itself can host up to three additional wireless carriers. (Exhibit 10)
11. Testimony brought to light that the Hearing Examiner's office recently heard an application for a similar tower proposed by Verizon on 226th Street SE near and north of the subject site. (File No. 05-122193 *Sea Echo Wireless Communication*). That location could serve VoiceStream. The Comprehensive Plan urges collocation. Voicestream already has a collocation agreement with Verizon. If that Verizon site is approved, collocation is available.
12. 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.

Conclusions of law as to the SEPA appeal

1. The standard of review on an appeal to the Hearing Examiner of a determination of nonsignificance is the "clearly erroneous" standard. Under that standard, the appellant bears the burden of proving that the environmental determination was "clearly erroneous", that is, although there is evidence supporting the determination, the hearing Examiner's review of the entire record leaves the Examiner "definitely and firmly convinced that a mistake was made. (SCC 30.61.310).
2. As the applicant in this matter notes (Exhibit 52) the Hearing Examiner must also be convinced that the SEPA official made the threshold determination based on information "reasonably sufficient to evaluate the environmental impact of a proposal."
3. The Examiner's judgment cannot be substituted for that of the SEPA official. The determination on appeal must be accorded "substantial weight" by the Examiner.
4. So viewed, and in the context of the entirety of the evidence of record, the Hearing Examiner is not left with the definite and firm conviction that a mistake was made that would warrant preparation of an environmental impact statement for the proposed telecommunications tower. The staff report's analysis and recommendations are well drafted in support of the determination of nonsignificance.
5. The SEPA appeal should be denied.

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

Conclusions of law as to the Conditional Use

1. The decision criteria for a conditional use permit are at SCC 30.42C.100. The findings of fact herein support concluding that the proposal so overwhelmingly dominates the appellant's rental home as to be materially detrimental to the rental use for which the appellants have used that house for many years. To locate a 150-foot structure a mere 58 feet from that residence oriented with its windows facing that tower does not meet the purpose, intent or specific language of SCC 30.42C.100(c).
2. Having so concluded, it must be noted that this decision does not set 58 feet as any minimum for the location of such a tower from a residence. This decision is limited to the facts of the instant matter.
3. The conclusion that the tower should be denied is also based on the nature of the surrounding community: a quiet, forested, rural milieu surrounding a lake where even the electricity infrastructure has been buried.
4. In summary, the tower does not respond appropriately to the existing and intended character, quality of development and physical characteristics of the surrounding property. (SCC 30.42C.100(1)(d)) Further, the application to the tower of any regulations would not soften or change the incompatibility of the tower with the subject vicinity.
5. Any conclusion of law in this decision which should be deemed a finding of fact is hereby adopted as such.

DECISIONS

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

The appeal of the threshold determination of nonsignificance is **DENIED**.

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

The application is **DENIED**.

Decision issued this 2nd day of February, 2005.

Ed Good, Deputy Hearing Examiner

<p>EXPLANATION OF RECONSIDERATION PROCEDURES</p>

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 **FEBRUARY 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.

EXPLANATION OF APPEAL PROCEDURES FOR THE SEPA APPEAL

The decision of the Hearing Examiner is final and conclusive with right of judicial review in Superior Court within 21 days following the county’s final decision on the underlying application or proposal. (As noted above, reconsideration by the Examiner may also be sought by any party of record.) For specific information about judicial review, please see SCC 30.61.330, RCW 43.21C.075 and WAC 197-11-680.

Staff Distribution:

Department of Planning and Development Services: Tom Barnett

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.