

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER

DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of)
)
T-MOBILE USA, INC. (*Martha Lake*)) **FILE NO. 06 124920 LU**
)
Conditional use permit and landscape modification to)
construct a wireless facility, including a 150 foot)
monopole, three panel antennas and equipment building)

DATE OF DECISION: July 19, 2006

DECISION (SUMMARY): The application for the wireless communication facility with related landscape modification is **CONDITIONALLY APPROVED**.

BASIC INFORMATION

LOCATION: The subject property is located at 18101 76th Avenue NW, Stanwood, Washington.

ACREAGE: R-5 acres

ZONING: Rural Residential-5 (1 du/5 ac)

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Rural Residential-5 (RR-5) (1 du/5 ac) with a Rural/Urban Transition

SELECTED AGENCY RECOMMENDATIONS:

Department of:

Planning and Development Services: Approval subject to conditions

Public Works: Approval subject to conditions

INTRODUCTION

The applicant filed the Master Application on March 28, 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 20, 21 and 22)

A SEPA determination was made on May 15, 2006. (Exhibit 19) No appeal was filed.

The Examiner held an open record hearing on July 11, 2006, the 75th 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 July 11, 2006 at 9:03 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. The applicant, T-Mobile USA, Inc., was represented by Gary Abrahams. Snohomish County was represented by Eric Olson and Roxanne Pilkenton of the Department of Planning & Development Services. SEPA threshold determination appellants William Crowe and Janice Chastain withdrew the appeal post-hearing subject to an agreement with the applicant that the approval be conditioned: (1) to require a new conditional use permit process if the monopole is ever sought to be extended above 150 feet and (2) to require not only that the subject antennas be flush mounted (as proposed) but that the antennas of any future co-locators also be flush mounted. (Exhibits 44, 45 and 46) The Examiner concurs and imposes both conditions, inter alia, herein as Conditions 4-C and 4-D. (The SEPA appeal fee shall be refunded.)
3. No member of the public is a party of record except the above-mentioned appellants William Crowe and Janice Chastain.

The hearing concluded at 9:25 a.m.

NOTE: The above information summarizes the information submitted to the Examiner at the hearing. However, an electronic recording of this hearing is available in the Office of the Hearing Examiner.

FINDINGS OF FACT, CONCLUSIONS OF LAW 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 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 hereby adopted by the Examiner as if set forth in full herein except as may specifically be noted otherwise.
3. The applicant, T-Mobile USA, Inc., filed an application for a conditional use permit and a modification of landscape requirements in order to construct a wireless telecommunications service facility and ground based equipment pursuant to SCC 30.42C and 30.25.040. The monopole's tip height is proposed at 150 feet. The pole will be painted dark green to best blend with existing trees. The monopole will hold three flush mounted antennas with capacity for co-location by two additional carriers. Existing landscaping offers better buffering from the monopole and its ground equipment shed than would the Code-required landscaping; hence, the applicant seeks a waiver of the landscape requirements. The existing vegetation will be protected by a Native Vegetation Retention Area. The monopole needs not be lighted to meet any Federal Aviation Administration flight safety requirements.
4. The subject site is addressed 18101-76th Avenue NW, Stanwood, which is south of the intersection of 76th Avenue W. and Lakewood Road. The site is zoned R-5, in which the proposed wireless telecommunications facility is permitted as a conditional use. The surrounding vicinity is also zoned R-5 and single-family homes abut on three sides and an installed water line evidences an impending single-family home on the fourth side. 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.
5. This application is one of the first to be vested under the County's amended Code at Chapter 30.28A and related Code amendments. This application's documentation includes a 21-page analysis of relevant sections of the amended Code and an attached search area map. (Exhibit 4) That portion of the application is exemplary not only as a review of the applicable sections of Chapter 30.28A but also as a response to the analysis required by Snohomish County Council Motion No. 06-172 of April 26, 2006, which remanded a wireless telecommunication facility matter to the Hearing Examiner with clarification of what issues should be reviewed in such matters. That Motion requires consideration of the 10-year-old Telecommunications Act of 1996, applicable case law and applicable past County decisions.
6. In compliance with the above-mentioned Snohomish County Code and the above-mentioned County Council Motion, the application packet includes non-ionizing electromagnetic exposure analysis, radio frequency engineer site analysis, a noise study, documentation of co-location attempts, signal propagation maps with and without the site, and a radio frequency engineer report justifying the need for the site and the height proposed. In further compliance, the Examiner has considered *Cingular Wireless v. Thurston County*, 131 Wn. App. 756 (2006) and cases cited therein and the Federal Telecommunications Act of 1996 (47 USC 222). Further, the Examiner has considered prior cases decided by the Office of the Hearing Examiner insofar as those are comparable in facts and applicable law to the instant case. One such case is *Nextel Communications, No. 97-110518* (May 28 1998) More recent cases have also been considered but, absent any argument by the parties as to any of those cases, citation is omitted.
7. Further, and as mentioned above, the Examiner is impressed by the section-by-section analysis of the new County Code language offered by the applicant (Exhibit 4). In a contested matter, the Examiner would tend to review challenged portions in detail. No need for such review is demonstrated here, in view of the withdrawal of the concurrent appeal of the SEPA threshold determination.

8. The request will not generate impacts to the County's park system or the school system.
9. The DPW reviewed the request with regard to traffic mitigation and road design standards. As a result, the DPW has determined that the development is concurrent and has no objection to the requests subject to various conditions.
10. The PDS Engineering Division has reviewed the concept of the proposed grading and drainage and recommends approval of the project subject to conditions, which would be imposed during full detailed drainage plan review pursuant to Chapter 30.63A SCC (Title 24 SCC).
11. 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 and no adverse affects will be made to the area as a result of allowing the proposed use.
12. 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.
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. The only changes to the recommendations of the staff report is to add two conditions pursuant to the joint recommendation of the neighbors and the applicant.
2. The Department of Public Works recommends that the request be approved as to traffic use subject to specific conditions.
3. The request is consistent with the GMACP, GMA-based County codes, and the type and character of land use permitted on the site by the applicable design and development standards.
4. The request should be approved subject to compliance by the applicant with the following conditions:

CONDITIONS

- A. The site plans marked Exhibits 3B through 3S shall be the official approved development plans for this project. Any discrepancy between the content of the official approved development plans and the performance standards of the SCC shall be resolved in favor of the standards contained within the SCC. Revision of official approved development plans is regulated by SCC 30.42C.110.

- B. In the event that the FAA requires the tower/structure to be lighted or marked, all lighting and markings shall be done per the FAA's specifications. All lights shall be shielded from the ground below to the maximum allowed. The tower shall not be lighted unless required by the FAA.
 - C. Any extension of the proposed monopole that may be requested in the future above one hundred and fifty feet (150 feet) shall require an additional conditional use permit approval.
 - D. All antennas to be attached by the applicant to the monopole will be flush mounted. Any antennas that may be attached in the future by co-locators shall also be required to be flush mounted to the monopole.
 - E. 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.
 - F. Each year after a personal wireless telecommunications service facility becomes operational; the facility operator shall conduct a safety inspection and file a report with the county within 60 days of the inspection. A report documenting that the facility complies with FCC Non-Ionizing Electromagnetic Radiation (NIER) limits shall be submitted with the report when any modifications to the facility have been added subsequent to the previous NIER report submittal.
 - G. 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.
 - H. 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)
5. 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 requests for a conditional use permit and a landscape modification are hereby **CONDITIONALLY APPROVED**, subject to compliance with the conditions set forth in Conclusion 4, above.

Decision issued this 19th day of July, 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 **JULY 31, 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 **AUGUST 2, 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: Roxanne Pilkenton

<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>
