

FINAL DECISION AND ORDER of the SNOHOMISH COUNTY HEARING EXAMINER

ORDER DATE: November 24, 2010

PLAT/PROJECT NAME: Verizon Wireless Lake Ketchum Tower

APPLICANT/

LANDOWNER: Bill Powell, Cascadia PM, Applicant on behalf of Verizon Wireless
8760 122nd Avenue NE, Kirkland WA 98033

Kenneth and Karrie Haugstad, Owners
31623 76th Avenue N.W., Stanwood, WA 98292

FILE NO.: 09-101791

TYPE OF REQUEST: CONDITIONAL USE PERMIT
SEPA – APPEAL OF DNS

DECISION (SUMMARY): **SEPA APPEAL IS GRANTED IN PART;**
APPLICATION IS REMANDED TO PDS

BASIC INFORMATION

GENERAL LOCATION: 31623 76th Avenue N.W., Stanwood, Washington 98292

TAX PARCEL NO. 320405-003-013-00

PDS STAFF RECOMMENDATION: Approve the Conditional Use Permit Application

INTRODUCTION

The applicant is requesting a conditional use permit (“CUP”) to construct and operate a 180-foot lattice tower and accompanying equipment on a 5-acre piece of property in the R-5 zone, which is presently used for single family residential purposes. The land is within the rural area and is designated as Rural Basic, 5 acres in the County’s GMA Comprehensive Plan. An open record hearing was held on the SEPA appeal and application on October 28, 2010 and November 4, 2010. At the hearing, Bill Powell appeared and testified on behalf of the Applicant, Roxanne Pilkenton appeared on behalf of Planning and Development Services (“PDS”), and testified. David Bricklin, Bricklin and Newmann LLP, appeared as counsel for appellants. In addition, appellants David Kohles, Patrice Kohles, Wayne Cornell, Cristie Cornell appeared and testified. James Price and Robert Sandoz appeared as expert witnesses on

behalf of the appellants. Finally, Richard Burt appeared and testified as an interested citizen in favor of moving the tower to another location.

At the hearing, the evidence and testimony of witnesses was presented in a bifurcated fashion for presentation purposes only, given the different burdens of proof related to the Type 1 SEPA appeal and Type 2 CUP pre-decision hearing. However, given the requirements of RCW 36.70B.110(6)(d), the open record hearing is considered a consolidated hearing and all evidence in the record was considered by the Examiner in reaching the decision herein.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

Based upon substantial evidence in the record, the following Findings of Fact, Conclusions of Law and Decision are entered:

FINDINGS OF FACT

1. The information presented in the Introduction Section is incorporated herein by this reference, as if set forth in full. All of the Exhibits shown on the master list of exhibits were entered into the record as evidence, along with the testimony of witnesses presented at the open record hearing.
2. On August 10, 2009, the applicant filed an application requesting approval of a conditional use permit under Chapter 30.42C SCC to construct a 180-foot lattice tower on a rural 5-acre lot presently used for single family residential purposes. The lattice tower will serve personal wireless telecommunication services facilities and other communication purposes and can hold up to 12 antennas. (Exhibits A1 and E2) The application includes the construction of supporting equipment within a fenced compound measuring 25 feet x 50 feet located adjacent to the lattice tower. The equipment compound will house an electric generator, one backup battery-powered generator, two 4.0 modular cells. The plans show that the equipment compound has room for the addition of another backup generator and future modular cell. (Exhibit B1, Sheet A-2)
3. Pursuant to the State Environmental Policy Act ("SEPA") (Chapter 43.21C RCW), the applicant submitted a Snohomish County Environmental Checklist dated March 4, 2009 to Planning and Development Services Department ("PDS") on August 10, 2009. However, a second Environmental Checklist dated March 15, 2010 was submitted to PDS on April 12, 2010. The first Environmental Checklist was included in the record before the Hearing Examiner. It appears that it was not withdrawn and is not marked "superseded" by PDS, although the threshold determination appears to be based upon the second Environmental Checklist. PDS issued a Determination of Nonsignificance ("DNS") on August 25, 2010. (Exhibit E2) As the lead agency, PDS determined that the proposal does not have a probable, significant adverse impact on the environment and that an environmental impact statement ("EIS") is not required pursuant to WAC 197-11-340.
4. When PDS issues a DNS, it must show that environmental factors were considered in a manner sufficient to amount to a prima facie compliance with the procedural requirements of SEPA and that the decision to issue a DNS was based on information sufficient to evaluate the proposal's

environmental impacts. *Wenatchee Sportsmen Assn. v. Chelan County*, 11 Wn.2d 169, 176, 4 P.3d 123 (2000). PDS need not consider impacts which are merely possible, speculative or remote, only those which are *probable*. *Indian Trail Property Owner's Assn. v. City of Spokane*, 76 Wn. App. 430, 441, 886 P.2d 209 (1994); RCW 43.21C.031; 43.21C.110(1)(d) and WAC 197-11-060(4)(a), (c).

5. PDS issued notice of the Open Record Hearing, Threshold Determination, Concurrency and Traffic Impact Fee Determinations on August 26, 2010. (Exhibit F1, F2 and F3)
6. PDS received comments from several citizens on the application. Two citizens wrote email messages stating their support for the application. (Exhibits H3 and H6) Three citizens wrote email messages stating their opposition to the application. (Exhibits H1, H2 and H5). No agencies expressed concerns in response to the SEPA notice.
7. On September 14, 2010, David and Patrice Kohles and Wayne and Cristie Cornell concurrently filed comments on the DNS and timely appealed the threshold determination. (Exhibit J1) The grounds for appeal can be summarized as follows:
 - a. The tower will cause probable significant adverse aesthetic and view impacts that were not adequately disclosed, analyzed or mitigated;
 - b. The tower construction will cause significant adverse stormwater impacts to the Kohles property which have not been adequately disclosed, analyzed or mitigated;
 - c. The threshold determination was not based upon information reasonably sufficient to evaluate the light impacts of the proposal;
 - d. The tower operation will cause probable significant adverse noise impacts that have not been adequately disclosed, analyzed or mitigated;
 - e. The tower project will cause significant adverse wildlife impacts that have not been adequately disclosed, analyzed or mitigated;
 - f. The DNS was improperly issued where the comment period and appeal period ran concurrently and PDS did not consider comments received during the comment period as required by WAC 197-11-340(f) prior to issuing a final threshold DNS;
 - g. PDS failed to provide notice to the Kohles family after their request to become a party of record;
 - h. In reaching its threshold determination, PDS failed to consider alternatives to the proposed tower project as required by RCW 43.21C.030 and WAC 197-11-060; and
 - i. In reaching its threshold determination, PDS failed to consider that the proposal conflicts with the County Code as required by WAC 197-11-330(3).
8. At the open record hearing, the Examiner first considered the SEPA appeal, for which the appellants have the burden of proof to show that the decision to issue a DNS was clearly erroneous based on one or more of the grounds presented in their appeal. The Examiner considers each of their claims in turn.
9. a. The tower will cause probable significant adverse aesthetic and view impacts that were not adequately disclosed, analyzed or mitigated.

In their pre-hearing brief, the appellants correctly claim that aesthetics are one element of the environment that must be addressed during the SEPA process pursuant to WAC 197-11-444(2)(b)(iv). (Exhibit J-21) The basis of their appeal as to this issue is that the Responsible Official lacked “reasonably sufficient” information in the record to evaluate the aesthetic impacts of the proposed tower and, that if the information had been present, that a Determination of Significance (DS) would have been made. (Exhibit J-21)

The burden of proof is on the appellants to show by substantial evidence that the SEPA Responsible Official’s failed to consider probable, significant adverse environmental impacts. *Indian Trail Property Owner’s Assn. v. City of Spokane*, 76 Wn. App. 430 441, 886 P.2d 209 (1994). On review, the Hearing Examiner must give substantial weight to the threshold determination of PDS. RCW 43.21C.090; *King County v. CPSGMHB*, 91 Wn. App 1, 30, 951 P.2d 1151 (1998). Here, the Examiner does not substitute her judgment for that of PDS, but may find the decision clearly erroneous only when she is left with the definite and firm conviction that a mistake has been committed. *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988).

In response to the appeal, Mr. Powell submitted a response brief on behalf of Verizon Wireless in which he states:

4. Location. The Appellant’s brief states that the impact of a cell tower is dependent on location or setting (commercial versus residential). This seems self-evident and will not be disputed. We expect to show that the Responsible Official had adequate information concerning our proposal to make a Threshold Determination. All of the elements concerning the aesthetics of the proposal such as location, height, and design are apparent in the proposal. We believe that this information, as well as the Responsible Official’s prior experience, is sufficient to make a Threshold Determination.

We begin our analysis with an examination of the information that was before the SEPA Responsible Official, Roxanne Pilkenton, when she made the Threshold Determination. PDS provided no analysis of what information was used to reach the Threshold Determination; as such, we look to the record.

Here, the record reveals that the Official had the Environmental Checklist and revised Environmental Checklist (Exhibits E1, E2), and the application materials submitted prior to August 25, 2010. These documents include: Exhibits A1 through A5; Exhibits B, C, D, G and comment from David Kohles (Exhibit H2). Ms. Pilkenton also made a site visit to the subject property and walked on the access road. She did not visit any of the surrounding properties or discuss the proposal with any of the neighbors, including the appellants. (Testimony of Roxanne Pilkenton)

Visual Impacts: Aesthetics and Property Values

The Environmental Checklist inquires about aesthetics at Paragraph 10 (a) through (c). In its revised Checklist, the applicant provided the following information:

10. Aesthetics

(a). *What is the tallest height of any of the proposed structure(s), not including antennas? What is the principal exterior building material(s) proposed?*

Applicant’s Response: “180’. The tower is to be constructed of steel.”

(b) *What views in the immediate vicinity would be altered or obstructed?*

Applicant's Response: "There are no significant viewsheds in the immediate area. Due to significant tree cover, the tower will only be visible from a few locations."

(c) Describe proposed measures to reduce aesthetic impacts, if any.

Applicant's Response: "The tower and attachments are to be painted to blend with the trees and sky. All mature trees at the site are to be retained."

The applicant also provided additional information relating to its application that is relevant to the threshold determination, specifically, the information set forth in the applicant's narrative found in Exhibit A3. There, the applicant asserts:

The proposed project will not be detrimental to uses or property in the immediate vicinity but will provide improved coverage to the [sic] area surround area. The major objection to wireless facilities [sic] are usually visual, not material. No use or enjoyment of the neighboring properties will be impacted.

(Exhibit A3 at page 2). The applicant's narrative continues, with this contradictory statement as to the compatibility of its tower with the surrounding rural area:

The area surrounding this site contains a mix of rural homes, commercial and hobby farms, and medium-density housing nearer Lake Ketchum. The area is heavily treed and has very gently rolling hills. **The low density of housing, lack of high-rise development, and generally low-volume roads that make such rural living attractive requires taller support structures to meet coverage objectives in a cost-effective manner. Such taller structures are consistent with typical development in such rural communities and meet the more rustic character of the area.** The ground equipment will be screened and soundproofing will make the site nearly noiseless. The support structure and antennas will be painted to minimize the visual impact and there will be little noise and no odors from the proposed development. . . .

(Emphasis added) Id.

At the public hearing, the appellants presented testimony relating to the visual impact of the 180-foot tower on their private property and the resulting loss in property values that would occur. The specific testimony can be summarized as follows:

David Kohles testified that they purchased their land in 1997. They have landscaped it with the intent of providing privacy and to protect their view corridors. They own a total of 10 acres and the north side of their land is the view side. All of their windows from their house face their pond and the proposed tower. He believes the tower is totally inconsistent with the rural character of the area. Mr. Kohles offered photographs which he had prepared in which an overlay of the proposed tower was added by Aaron Weholt. (See, Exhibits K1, K2, K3, K4 and K5). These attempt to show the proposed impact of the tower on his property and that of his neighbors, the Cornells. He testified that the existing trees will not block the 180-foot lattice tower, which will extend much taller than the Evergreens and it will be visible in the winter when the deciduous trees drop their leaves. Additionally, using Exhibit K5, Mr. Kohles testified that he planted the trees marked on the Exhibit in black ink about 10 years ago. They are currently only about 10-12 feet high, with irrigation and good sun exposure. He stated that the proposed landscape buffer that the County requires will take 100 years to grow tall enough to provide any meaningful buffer. He stated that the tallest trees in the area are about 125 feet. He further testified that other neighbors will suffer visual impacts from the tower. He noted that the people living to the northwest of his property have a straight view of the tower with no trees obscuring it and that

people living to the north of his property have some trees that will block the view of the tower but that they are insufficient to completely block it. Mr. Kohles testified that there are no dropped calls in the area and that he believes service in the area is better than that suggested by Verizon. He also noted that the potential area to be served by the new tower is largely in the Skagit delta which is all farmland or habitat. (Exhibit K-11) He stated that there are no other industrial facilities in the area, only commercial farmland. He noted that there is a cell tower located 2.5 miles away and one at the Fire Department. Mr. Kohles testified that the financial loss they would suffer from the drop in property values resulting from the tower would be a large adverse impact to their family.

Wayne Cornell testified that the photograph (Exhibit K5) was taken from his home and that it accurately depicts the views that they have from his home. The depiction shows the impact of the tower on his property and that it will be visible from every window in their home. He also testified that he drives every day to Kent but lives in this rural area because he loves farming and the rural lifestyle. He has been involved in the FFA organization, he grows a garden and they built their own home. Mr. Cornell testified that it is unfair for his family to have to accept the decrease in their property values as a result of Verizon's project. He stated that he doesn't want their money; he simply doesn't want their impacts. Finally, Mr. Cornell testified that he works out of his home on occasion and bids on commercial contracts. He stated that his cell coverage is good for his cell phone and his home computer.

Patrice Kohles testified that she is home most of the time. She avoided purchasing a home in Redmond specifically because it had a cell tower near it. They would not have invested in this property if they knew that it could be adjacent to a tower like this one. She testified that they have invested a significant amount of time and money landscaping their own property, building a fish pond and garden. They have four dogs which she walks around the perimeter of their 10 acres several times each day. She noted that the trees buffering their property are wide in one area but narrow in another. She testified that she will constantly see the proposed tower and that it will dramatically change the character of the property and diminish the natural setting. She stated that the tower will have a significant adverse impact on her use and enjoyment of the property and that she will move out if it is built. However, she is now concerned that the tower will prevent them from being able to sell the property. Mrs. Kohles also testified that she has good cellular coverage and does not experience dropped calls with her current Verizon service.

Richard Burt testified that he lives in the area and wonders why the proposed tower cannot be moved north of 319th Street, where all of the tall trees are present. He testified that this is only common sense. Mr. Burt further testified that he does not lose cellular coverage in the area, nor do the neighbors that he has asked about it.

Cristie Cornell testified that she has lived on her land for the past 11 years. She loves the rural nature of the area. They built their own home and their pastures. She is a homemaker and doesn't want to see this tower all the time. She testified that they would not have purchased their land had they known that there would be a cell tower in the proposed site. She stated that their land is a park-like setting and the character of the area is rural. The proposed tower will be an ugly structure that will obstruct her views. Ms. Cornell further testified that she is a Verizon customer and that her cellular service is acceptable. She stated her concern about being able to sell her property due to the existence of the tower in the future.

James B. Price testified as an expert appraiser on behalf of the appellants. He performed a site visit and looked at the proposed tower site and the visibility of the proposed tower from the surrounding properties. He noted that he has been involved in the siting of cell towers in the past, working both on the behalf of wireless companies and on behalf of private property owners. In his opinion, Mr. Price stated that the tower will have a significant adverse impact on the appellants' property values. He stated that the tower's existence will also limit the pool of potential buyers and extend the time taken to sell the property. He testified that the impact will

be generally 21 percent in values in the area. With regard to the Kohles property, Mr. Price testified that their property will drop 8-10 percent in value or \$52,000 to \$66,000 using a value of \$662,000 for their home. With regard to the Cornell property, Mr. Price testified that their property will drop 6-8 percent in value or \$18,772 to \$24,000 using their current home value. Mr. Price testified on cross-examination that cellular coverage is important to buyers, but that it will impact the property values of those homeowners living closest to the tower.

Robert Sandos testified as an expert real estate broker on behalf of the appellants. He testified that he was asked to evaluate the impacts of the proposed cellular tower on the appellants' properties. He stated that he has over 30 years in the commercial and residential real estate business and currently works as a broker. The appellants' properties would be considered country estates, which are typically in the higher end of the market (above \$500,000 in value). He stated that, in general, there are a very limited number of buyers for these properties. Mr. Sandos testified that he heard the opinion presented by Mr. Price and believes that the impacts to the property values of the appellants would be more dramatic than those suggested by Mr. Price. In terms of the impact to a buyer's quiet enjoyment of their property, he testified that the presence of the tower will simply eliminate the property from most buyers' short lists of potential properties. On cross-examination, he testified that there are other structures such as barns in the area that could be visual blockages. However, he noted that they are an expected part of the landscape and rural character and a cell tower is not. He noted that even in a seller's market, this tower would still have an impact on property values. Mr. Sandos testified that he believes that the impact is bigger than a percentage point.

Neither PDS nor the applicant offered any witnesses or evidence contradicting the expert testimony or lay person testimony presented by the appellants, however Mr. Price and Ms. Pilkenton did testify. Their testimony can be summarized as follows:

Ms. Pilkenton testified that in making her SEPA threshold determination, she visited the proposed site to assess the impacts on aesthetics. She didn't go on the appellant's properties or contact them. Ms. Pilkenton did review the Exhibits submitted by Verizon, as well as ARC view and Google Earth. In her opinion, she believes that the 20-foot landscaping buffer required by the Code will adequately shield the neighboring properties from the tower, along with the existing trees. Ms. Pilkenton testified that the impact of the tower on visual aesthetics is minimal because it does not significantly limit or deny the use of the adjacent properties. Ms. Pilkenton testified on cross-examination that the Code offers mitigation including setbacks, painting and landscaping. She stated that the tower represents only a 1 percent blockage of the appellants' 180 degree view of their land. She also cites to the information presented in her staff report at Exhibit I (at pages 6 and 12). When asked whether she considered the consistency of the tower with rural character and Goal LU.6 of the Comprehensive Plan, Ms. Pilkenton testified that the tower does have an impact on rural character, but not a significant one. She acknowledged that the majority of the trees buffering the view are on Mr. Kohles' property and not on the applicant's land. (Exhibit K7) Ms. Pilkenton stated that if there was no Type A landscaping offered, she would not have determined that the visual buffer was adequate. She further testified that most of the Code requirements are related to dealing with aesthetic concerns and that the Code does encourage co-location due to aesthetics. On cross-examination, Ms. Pilkenton acknowledged that there will be a change in the appellants' view, but not a significant one.

Bill Powell testified on behalf of the applicant that he knows that no one wants to look at a cell tower. But, according to Pugh Research, 85 percent of Americans own a cell phone. Roughly ¼ of US households are solely wireless. He asserted that E-911 service is missing from the area, and that coverage is poor, as shown by their recent boom truck test. He stated that the site is their last choice, but it is all they are left with and it does fill a need in the area. Mr. Powell testified that he can't say there is no impact; the question is how much of an impact will there be, and was the threshold determination made in error. He believes that view of the tower

shown in Exhibit K5 is logically consistent with the perspective that will be seen, but that Exhibit K2 is not an accurate representation of the view of the tower on the appellant's property. On cross-examination he admitted that he did not do a simulation drawing or photograph from the appellant's property. On the second day of hearings, Mr. Powell testified that Verizon could lower the height of the pole, although it would impact coverage.

Coverage Analysis

The applicant alleges that the Lake Ketchum area is under-served by wireless services. (Exhibit A2) The applicant states that the site was chosen due to its proximity to existing trees to mitigate the visual impacts. (Exhibit A2) The applicant stated that it performed an "... exhaustive search for collocation opportunities *within our search area* by consulting FCC databases, lists from tower owners, and by visual examination of the search area." (Emphasis Added). (Exhibits A2 and C7) They report that:

No facilities are available for [*sic*] collocation. All of the property within our search area is zoned Residential although several commercial/agricultural properties are in the area. We contacted many landowners and were unable to find a landowner of a commercial facility that was willing to lease the needed space. Several private homeowners were willing and we have begun lease negotiations with the owners of the parcels for which we are applying.

(Exhibit A2) Mr. Powell testified that this site is their last choice under the County's regulations, but that it is the only one available to them. The applicant disclosed the boundaries of its self-selected search area. (Exhibit A3; Attachment) The area searched was a polygon that measures only 3,400 x 1,000 x 2,400 x 800 x 1,600 feet. The applicant has provided no justification (technical or otherwise) for selecting such a small search area for siting purposes. The document entitled, "SEA Lake Ketchum RF Justification" written by Fred Weisbrod, RF Engineer for Verizon Wireless (set forth in the attachment to Exhibit A3) was provided by the applicant in response to PDS comments on its CUP application. It was not submitted until February 9, 2010, six months after the application was filed.

The applicant has not disclosed the locations or names of the private homeowners that they found were willing to lease land to the applicant for its commercial wireless purposes. The North County Regional Fire Authority, located at 19727 Marine Drive in Stanwood, Washington 98292, commented that the Fire District has a cell tower on its property, which is less than three miles from the chosen site, which is available for co-location. (Exhibit G2)

In its analysis of the proposal's consistency with the County's GMA Comprehensive Plan, the applicant again states that the site was selected in part because it fills a "significant gap in coverage for Verizon Wireless in the Lake Ketchum area." Id.

However, on cross-examination, Bill Powell admitted that there is marginal coverage in the area, and that one can make a phone call, but they need to expand to provide for call reliability and data services too. (Testimony of Bill Powell; November 4, 2010). David Kohles agreed and presented evidence demonstrating that there is cellular coverage all the way around Lake Ketchum using Verizon personal wireless cellular devices. (See, Declaration of Christopher Maloney; Exhibit K8, and audio recording file; Exhibit K9) The Examiner finds that there is substantial evidence in the record demonstrating that there is Verizon coverage in the area and not a "substantial gap" in coverage as their application suggests. The Examiner finds that the applicant is seeking to improve its wireless capacity with the construction of the tower, not necessarily its coverage.

b. The tower construction will cause significant adverse stormwater impacts to the Kohles property which have not been adequately disclosed, analyzed or mitigated.

Mr. Kohles testified that the proposed tower will exacerbate flooding (approximately six inches of standing water), that occurs during the winter rainy season on the northwest corner of his 5-acre property. He testified that the subject property slopes toward his property, and that the addition of impervious surfaces on the subject property from the construction of the tower and equipment compound will increase runoff onto his property. He testified on cross-examination that he has not filed a drainage complaint with the County because he knew of the problem when he bought the property. Mr. Kohles admitted that he has not hired an engineer to review the drainage flow and substantiate his concerns. He did not rely on a topographic map to determine where the drainage would flow; he simply "eye-balled it." (Testimony of David Kohles)

PDS presented its analysis of the stormwater impacts arising from the subject property in Exhibit I at page 7. PDS notes that the applicant has prepared a Targeted Drainage Report dated April 2, 2009 (Exhibit CI), which was reviewed by the County's Engineering Section. The applicant provided cut and fill calculations to PDS. The project will require 625 cubic feet of fill and 2,700 cubic feet of grading. (Exhibit A3) Based on the information in the record, PDS concluded that the addition of impervious surfaces from the proposed tower would not exacerbate and increase flooding on the Kohles property. Id.

c. The threshold determination was not based upon information reasonably sufficient to evaluate the light impacts of the proposal;

As stated in Exhibit I, there are no lights proposed for the tower because it will be below the 200-foot height limit where lighting would be required by the Federal Aviation Administration. The appellants presented no evidence to refute this testimony.

d. The tower operation will cause probable significant adverse noise impacts that have not been adequately disclosed, analyzed or mitigated;

The appellants presented no evidence in support of its claims that adverse noise impacts were not adequately disclosed, analyzed and mitigated. The Examiner finds that the appellants abandoned this claim.

e. The tower project will cause significant adverse wildlife impacts that have not been adequately disclosed, analyzed or mitigated.

The applicant presented a Priority Habitat and Species Assessment dated June 6, 2009. (Exhibit C6) The applicant is required to comply with the requirements of Chapter 30.61.330 (critical areas regulations) in applying for the conditional use permit. The appellants presented no evidence in support of its claims that the impacts to wildlife were not adequately disclosed, analyzed and mitigated.

f. The DNS was improperly issued where the comment period and appeal period ran concurrently and PDS did not consider comments received during the comment period as required by WAC 197-11-340(f) prior to issuing a final threshold DNS;

The requirement of WAC 197-11-340(f) provides that the responsible official shall reconsider the DNS based on timely comments and may retain or modify the DNS or, if the responsible official determines that significant adverse impacts are likely, withdraw the DNS or supporting documents. Here, PDS issued the DNS and provided a comment period of 14 days. (Exhibit E2) The notice also specified that appeals of the threshold decision are required to be filed within the same 14 day period. Id. The appellants claim that PDS used an improper procedure by combining the comment and appeal periods. Although the procedure suggested by

appellants may be more favorable in light of WAC 197-11-340(f), there is nothing in that regulation which prevents the appeal period from running concurrently with the comment period.

g. PDS failed to provide notice to the Kohles family after their request to become a party of record.

At the public hearing, Mr. Kohles testified that he did receive the Notice of the Threshold Determination in the mail. He stated, however, that they received the postcard notice one week later and that they lost time to respond. Mr. Cornell also testified that he did not receive notice of the decision. However, the record shows that PDS properly provided notice to both appellants Kohles and Cornell. According to the Affidavit of Kris Arnett, postcard notice was mailed to both appellants on August 26, 2010. Both parties are shown on the list of parties to whom the notices were sent. (Exhibit F1) As such, the Examiner finds that notice was properly provided.

h. In reaching its threshold determination, PDS failed to consider alternatives to the proposed tower project as required by RCW 43.21C.030 and WAC 197-11-060.

PDS asserts that it is only required to consider alternatives to the proposed tower if they issued a DS. (Exhibit I at p. 8) The Examiner concurs. The appellants present no law, regulation or court decision barring the procedure used by PDS.

i. In reaching its threshold determination, PDS failed to consider that the proposal conflicts with the County Code and/or Comprehensive Plan as required by WAC 197-11-330(3).

The Examiner does not find that it is necessary to reach this issue at this time, as the underlying permit has not yet been considered.

10. A conditional use permit ("CUP") cannot be issued unless all of the requirements of SCC 30.42C.100 are met. However, the CUP is not ripe for consideration by the Examiner where an EIS must be prepared and added to the record herein, along with any revisions to the application and revisions, if any, to the staff recommendation to the Hearing Examiner resulting from the EIS. "One of the most important aspects of the SEPA process is the consideration of environmental impacts and possible mitigation measures during agency decision-making. SEPA substantive authority gives all levels of government the ability to condition or deny a proposal based on environmental impacts." SEPA Handbook, Appendix D, Section 6, 2003 Edition.

CONCLUSIONS OF LAW

1. The Hearing Examiner is authorized to hear this SEPA appeal and CUP application pursuant to Chapter 30.72 SCC. The single open record hearing is a combined, Type 1 appeal and Type 2 decision under the County Code.
2. As noted above, the burden of proof is on the appellants to show by substantial evidence that the SEPA Responsible Official's failed to consider probably, significant adverse environmental impacts. *Indian Trail Property Owner's Assn. v. City of Spokane*, 76 Wn. App. 430 441, 886 P.2d 209 (1994). On review, the Hearing Examiner must give substantial weight to the threshold determination of PDS. RCW 43.21C.090; *King County v. CPSGMHB*, 91 Wn. App 1, 30, 951 P.2d 1151 (1998). Here, the Examiner does not substitute her judgment for that of PDS, but may find the decision clearly erroneous only when she is left with the definite and firm conviction that a mistake has been committed. *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988).

3. The Hearing Examiner has analyzed each of the appellants' SEPA claims and concludes as to each of them as follows:

a. The tower will cause probable significant adverse aesthetic and view impacts that were not adequately disclosed, analyzed or mitigated;

Based on substantial evidence in the record, the Examiner is left with a definite and firm conviction that a mistake has been made by the SEPA Responsible Official. The Responsible Official did not consider "reasonably sufficient" information as to the probable, significant adverse impacts to the property values and visual aesthetics of the surrounding property owners. Accordingly, the SEPA determination was clearly erroneous. Here, substantial evidence was presented during the hearing and in the record that the presence of the tower would have a significant adverse impact on the appellant's quiet enjoyment of their property, as well as an impact on the rural character of the area. The evidence in the record shows that the Kohles and Cornell properties will face a significant drop in property values and their ability to sell their land will be affected by the siting of the proposed tower. The fact that the SEPA Responsible Official considered the fact that 179 degrees of their 180 degree view would not include the cellular tower is clearly erroneous. The impact of the tower is real and not simply from a subjective standpoint. The appellants' experts stated that a reasonable buyer would be affected by the presence of the tower and many would simply exclude the property outright as a result of the structure. The appellants effectively proved that the landscape buffer would be unlikely to provide any real screening for a 180-foot tower for the better part of 100 years.

Given that the appellants have proven that there are significant adverse environmental impacts relating to the aesthetic impacts to their property and property values, a Determination of Significance (DS) should have been made and an Environmental Impact Statement should have been required, where information could have been disclosed as to whether any reasonable alternatives are available to a single, lattice or monopole tower, or whether there is any mitigation that can be imposed.

Further, the Hearing Examiner concludes that the applicant is not attempting to close a significant gap in service as was suggested. Additionally, the Examiner determines that the location of the pole may not be the least intrusive means of siting the tower based on the fact that at the second day of the hearing, Verizon suggested that it could lower the pole without any prior warning to the parties. The preparation of an EIS will provide the opportunity to address such alternative proposals prior to the Examiner considering the CUP and proposed mitigation.

b. The tower construction will cause significant adverse stormwater impacts to the Kohles property which have not been adequately disclosed, analyzed or mitigated;

PDS determined that the information in the record was adequate to consider the impacts of grading and drainage and its effects on-site and off-site to surrounding properties. The Hearing Examiner agrees. The appellants have not met their burden of proof to show that the SEPA determination as to drainage impacts were clearly erroneous.

c. The threshold determination was not based upon information reasonably sufficient to evaluate the light impacts of the proposal;

The Examiner concludes that the appellants failed to meet their burden of proof on this issue.

d. The tower operation will cause probable significant adverse noise impacts that have not been adequately disclosed, analyzed or mitigated;

The Examiner concludes that the appellants failed to meet their burden of proof on this issue.

e. The tower project will cause significant adverse wildlife impacts that have not been adequately disclosed, analyzed or mitigated;

The Examiner concludes that the appellants failed to meet their burden of proof on this issue.

f. The DNS was improperly issued where the comment period and appeal period ran concurrently and PDS did not consider comments received during the comment period as required by WAC 197-11-340(f) prior to issuing a final threshold DNS;

The Examiner concludes that the appellants failed to meet their burden of proof on this issue.

g. PDS failed to provide notice to the Kohles family after their request to become a party of record;

The Examiner concludes that Kohles did receive notice. Appellants' claim as to this issue is denied.

h. In reaching its threshold determination, PDS failed to consider alternatives to the proposed tower project as required by RCW 43.21C.030 and WAC 197-11-060; and

Based on the conclusion reached in (a), above, the Examiner finds that a DS should have been issued and that an EIS considering alternative proposals should have been provided.

i. In reaching its threshold determination, PDS failed to consider that the proposal conflicts with the County Code as required by WAC 197-11-330(3).

The Examiner concludes that it is not necessary to reach this issue at this time.

ORDER

1. The SEPA appeal is granted in part and denied in part as stated in the Conclusions of Law, herein.
2. The SEPA Threshold Determination is overturned and a Determination of Significance (DS) shall be issued. This matter is remanded to PDS to issue the DS and require the preparation of an EIS addressing the impacts to the aesthetics of the surrounding area, and shall include alternative proposals.
3. The decision on the conditional use permit shall be stayed until such time as an EIS is prepared and submitted to PDS for consideration and forwarded to the Examiner, along with any changes to the proposal and/or proposed conditions, if any.

Dated this 24th day of November, 2010.

Millie M. Judge, Hearing Examiner

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

The attached decision is an order remanding the application back to PDS for further proceedings. As such, it is not a final decision and order for which an appeal may be sought. An appeal may be filed only after a final decision is issued.

However, reconsideration by the Examiner may be sought by one or more parties of record. The following paragraphs summarize the reconsideration processes. For more information about reconsideration procedures, please see Chapter 30.72 SCC and the respective Examiner 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 **December 6, 2010**. 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.

Staff Distribution:

Department of Planning and Development Services: Roxanne Pilkenton, PDS

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.