



**REVISED FINAL DECISION AND ORDER of the
SNOHOMISH COUNTY HEARING EXAMINER**

Hearing Examiner's Office

Email: Hearing.Examiner@co.snohomish.wa.us

ORDER DATE: January 12, 2011

Millie Judge
Hearing Examiner

PLAT/PROJECT NAME: Verizon Wireless Lake Ketchum Tower

M/S 405
3000 Rockefeller Ave.
Everett, WA 98201

APPLICANT/
LANDOWNER:

Bill Powell, Cascadia PM, Applicant on behalf of Verizon Wireless (425) 388-3538
8760 122nd Avenue NE, Kirkland WA 98033 FAX (425) 388-3201

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

APPELLANTS: David and Patrice Kohles, and Wayne and Cristie Cornell

FILE NO.: 09-101791

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

DECISION (SUMMARY): **SEPA APPEAL IS GRANTED IN PART AND DENIED IN PART
APPLICATION IS REMANDED TO PDS FOR ISSUANCE OF
DETERMINATION OF SIGNIFICANCE**

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 wireless facility designed as 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, and Roxanne Pilkenton appeared and testified on behalf of Planning and Development Services ("PDS"). David Bricklin, Bricklin and Newmann LLP, appeared as counsel for appellants. In addition, appellants David Kohles, Patrice Kohles, Wayne Cornell and 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 required relating 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 (Type 2) and all evidence in the record was considered by the Examiner in reaching the decision herein.¹

The original Decision and Order in this matter was issued on November 24, 2010. (Exhibit L1) On December 6, 2010, Verizon Wireless filed a timely petition for reconsideration. (Exhibit L3) Comment and additional briefing was received from the parties of record. (Exhibits L4 and L7).

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 and, after reconsideration, 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 CUP 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 and 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 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 have been 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

¹In its Petition for Reconsideration, Verizon Wireless asserts that reconsideration is based on SCC 30.71.120, since the appeal of a SEPA threshold determination is an appeal of a Type 1 decision. The Examiner agrees. When a Type 1 SEPA appeal is combined with a Type 2 decision (the CUP), the combined hearing is a Type 2 proceeding under SCC 30.72.065. However, the decision, reconsideration and appeal procedures for the Type 1 SEPA appeal are governed by the requirements of Chapter 30.71 SCC.

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. (Exhibits 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) They presented nine separate grounds for appeal, which 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 Paragraph 10, below.
9. With regard to the application for a CUP and the exercise of discretion, the Hearing Examiner must consider not only the County's wireless regulations, but also the federal Telecommunications Act of 1996, which amended 47 U.S.C. Section 332(c), by adding a new

Section 7 to the National Wireless Telecommunications Siting Policy (hereinafter referred to as "TCA") that provides:

(7) Preservation of local zoning authority.--

(A) General authority.--Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations.--

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Records. Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(C) Definitions.--For purposes of this paragraph--

(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).

(Emphasis added). See, U. S. Public Laws of the 104th Congress, 2nd Session (1996) S 704, PL 104-104.

10. Appellant's SEPA Claims.

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 J21) 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 J21) The burden of proof is on the appellants to show *by substantial evidence* that the SEPA Responsible Official 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)).

Standard of Review. 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, and 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)).

Verizon argues in its Memorandum of Law (Exhibit K12) that a decision cannot be made solely on aesthetic impacts, citing *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 70, 578 P.2d 1309 (1978) and *Victoria Tower Partnership v. Seattle*, 59 Wn. App. 592, 603, 800 P.2d 380 (1990) *rev. denied*, 116 Wn.2d 1012, 807 P.2d 884 (1991). However, those cases are not applicable to an administrative appeal of a threshold determination. Those cases address whether the City properly exercised its *police power* or SEPA *substantive authority* to *deny* projects based on aesthetics impacts (as in *Polygon*), or other SEPA policies, such as a comprehensive plan policy alone, (as in *Victoria Tower*), not whether a DNS was properly issued. As the Supreme Court stated in the *Polygon Corp.* decision, visual or aesthetic elements of the environment are included within SEPA's scope of consideration and protection:

All factors are to be considered in light of the public policy expressed in SEPA of maintenance, enhancement and restoration of the environment. RCW 43.21C.020. The visual or aesthetic element is recognized as part of the environment that is to be maintained and enhanced. RCW 43.21C.020(2)(b).

(*Polygon Corp. v. Seattle*, 90 Wn.2d 59, 70, 578 P.2d 1309 (1978)). In reaching a decision, the Examiner must consider whether the appellants presented substantial evidence showing that PDS lacked "reasonably sufficient" information in the record to evaluate the aesthetic impacts, and therefore failed to consider probable, significant, adverse environmental impacts of the 180-foot wireless tower, after giving substantial weight to the PDS determination. In weighing the evidence, if the Examiner is left with a firm and definite conviction that a mistake was committed, the Examiner may conclude that the SEPA decision was clearly erroneous, and take one of the actions described in SCC 30.71.110(2).²

The Evidence Presented. 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.

Here, Verizon agrees that the setting is an important factor in determining the impact of a cell tower. However, they argue that Ms. Pilkenton had all of the information she needed to reach a decision. We begin our analysis with an examination of the information that was before the

² SCC 30.71.110(2) states that in ruling on a Type 1 appeal, "The Examiner may affirm, may reverse in whole or in part, or may modify the permit or decision being appealed, or may remand the application to the applicable department for further processing." If the Hearing Examiner remands the application or decision to PDS for further processing, the Hearing Examiner's decision "shall specify procedures for responding to the order." (See, SCC 30.71.110(3)). PDS argues on reconsideration that the Examiner lacks the authority to overturn the DNS and require a DS. However, the plain language of SCC 30.71.110(2) grants the Examiner the authority to reverse in whole or in part the SEPA threshold determination being appealed, or modify the decision.

SEPA Responsible Official, Roxanne Pilkenton, when she made the Threshold Determination. PDS provided no written description of what information it used to reach the Threshold Determination; as such, we look to the record and Ms. Pilkenton's testimony at the hearing.

The record reveals that the SEPA Responsible 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 a comment from David Kohles (Exhibit H2). Ms. Pilkenton also made a site visit to the subject property and walked on the access road. However, Ms. Pilkenton admitted in her testimony at the hearing that 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)

At the time of the threshold determination, Ms. Pilkenton did not have Exhibit A3, which is the applicant's justification for the siting at the proposed location, which was not added to the record until six months later.³

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."

Ms. Pilkenton testified that she did review the exhibits submitted by Verizon, as well as ARC view and Google Earth. She stated that in her opinion, the 20-foot landscaping buffer required by the Snohomish County Code ("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 one

³ Exhibit A3 is a justification for Verizon's siting decision. It states:

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. . . . 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.

percent blockage of the appellants' 180 degree view of their land. She also cited 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 she felt it was not a significant impact. She acknowledged that the majority of the trees buffering the view of the wireless tower are on Mr. Kohles' property and not on the applicant's land (meaning they are not subject to regulation under the applicant's permit). (Exhibit K7)

Ms. Pilkenton stated that if the applicant had not offered to provide Type A landscaping, she would not have determined that the visual buffer was adequate to mitigate its impacts. She further testified that most of the County 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.

At the public hearing, the appellants presented testimony relating to the significant adverse aesthetic and visual impacts of the placement of a 180-foot tower adjacent to their private property, and their resulting loss of quiet enjoyment and rural use of their land and the negative impact on property values that would occur in the area. The specific testimony can be summarized as follows:

David Kohles testified that he and his wife 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 photos 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.

Mr. Kohles 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. As to the justification for placing the tower in the area, 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 natural, undeveloped habitat. (Exhibit K11) 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 significant 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 he

and his wife 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 Verizon's money; he simply doesn't want the adverse impacts from the tower. Finally, as to wireless coverage in the area, 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 on 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 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 a 21 percent decrease in values in the general 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 expert witnesses or documentary evidence contradicting the expert testimony or lay person testimony presented by the appellants. In response, Bill Powell testified, acknowledging the visual and aesthetic impacts of wireless facilities. He testified 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. He stated that 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 the 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 Mr. Powell 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 to lessen the visual impacts of it, although it would impact 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 ("CAR") in applying for the CUP. 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 open record 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 address this issue at this time, as the underlying permit has not yet been considered.

11. Conditional Use Permit. A 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. With regard to the SEPA appeal, as noted above, the burden of proof is on the appellants to show by substantial evidence that the SEPA Responsible Official lacked reasonably sufficient information and 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. CPSPGMHB*, 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;

Having given substantial weight to the determination of PDS, and 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 Examiner concludes that 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 appellants' quiet enjoyment of their property, as well as an impact on the rural character of the area. In addition, 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. While a drop in property values is not within the zone of interests protected by SEPA, the evidence is suggestive of the significance of the adverse impact that the tower will have on the aesthetics of the surrounding area.

Having reviewed the entire record, the Hearing Examiner concludes that the SEPA Responsible Official considered the potential impacts too narrowly, ignoring other important information which was presented during the appeal. The Responsible Official focused mainly on a "one-degree view impairment," excluding consideration of the broader impacts to the appellants' quiet enjoyment and use of their properties and significant adverse impacts to the rural character of

the area that would be caused by a 180-foot tower looming overhead in their rural residential neighborhood.

As the appellants demonstrated, the impact of the tower is real and quantifiable from an objective standpoint, and not simply from the subjective standpoint of the landowners, although their testimony as to the significance of the adverse aesthetic impacts was detailed and compelling. 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 from their consideration for purchase as a result of the structure. This evidence is important in that it demonstrates not only the significance of the impacts perceived by appellants Kohles and Cornells, but that an objective person would also perceive more than a moderate adverse impact with regard to the aesthetics of the area resulting from the new wireless tower. This evidence further demonstrates that it was clearly erroneous to conclude that the impacts to the aesthetics of the area surrounding the tower are not "significant adverse impacts" within the meaning of SEPA. None of this information was considered by Ms. Pilkenton at the time of the SEPA threshold determination.

In terms of the mitigation proposed, Ms. Pilkenton testified that without the landscape buffer, she would not have found that impacts from the tower were adequately mitigated. Yet, 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. Furthermore, Ms. Pilkenton acknowledged that the majority of the trees currently offering a buffer of views of the wireless tower are on neighboring properties (which means they are not subject to regulation and could be removed). The Examiner concludes that the proposed landscaping offered by Verizon will not adequately mitigate the visual and aesthetic impacts of the 180-foot lattice tower. The proposed landscaping plan using Evergreen trees will take 75-100 years to reach maturity at 110-125 feet tall, and then their full height will still be short of the tower height.

In making a SEPA threshold determination where impacts to aesthetics are involved, such as in the present case, the SEPA Responsible Official must consider the full impacts of the proposed facility on surrounding properties and uses to meet the "reasonably sufficient information" standard. The evidence and testimony presented by Ms. Pilkenton was afforded substantial weight by the Examiner. However, in light of the substantial evidence of other impacts presented by appellants that were not considered by Ms. Pilkenton, the Examiner is left with a definite and firm conclusion that a mistake was made and the resulting SEPA decision was clearly erroneous.

Verizon argues that the SEPA Responsible Official had all of the information she needed about the project to make an informed threshold determination. However, having information about Verizon's plans, designs and proposed mitigation is not enough. Furthermore, the SEPA Checklist provided by the applicant was plainly insufficient. There, the only information provided about aesthetic impacts by the applicant was a statement that "[t]here are no significant viewsheds in the immediate area. Due to significant tree cover, the tower will only be visible from a few locations." (Exhibit E1, E2) In describing the proposed measures to reduce aesthetic impacts, Verizon wrote that the facilities would be "...painted to blend with the trees and sky. All mature trees at the site are to be retained." *Id.* However, the appellants proved that no significant trees are on the subject property. No discussion of the aesthetic impacts to the surrounding uses and land was provided. The Responsible Official must take reasonable steps to understand the probable impacts of the proposed wireless facility on the surrounding properties and on the rural character of the area. The Examiner concludes that this was not done and the resulting decision was clearly erroneous.

Given that the appellants have proven that there are significant adverse environmental impacts relating to the aesthetic impacts to their property, a Determination of Significance (DS) should have been issued and an Environmental Impact Statement ("EIS") should have been required.

An EIS will provide the Examiner with important information in making a final decision as to the CUP including, for example, whether any reasonable alternatives are available to a single, lattice or monopole tower, or whether there is any other mitigation that can be imposed beyond the landscape buffer. Reasonable alternatives to the proposal shall be considered in the EIS pursuant to RCW 43.21C.110(1)(d).

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.

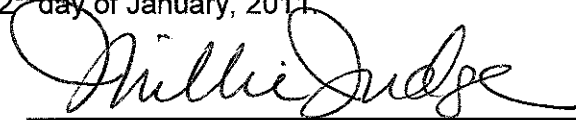
i. In reaching its threshold determination, PDS failed to consider that the proposal conflicts with the County Code as required by WAC 197-11-330(3).

The Examiner concludes that it is not necessary to reach this issue at this time. The Hearing Examiner will consider whether the application for a CUP meets the requirements of the Code after the preparation of the EIS.

ORDER

1. The SEPA appeal is granted in part and denied in part as stated in the Conclusions of Law, herein.
2. Pursuant to the authority granted the Hearing Examiner in SCC 30.71.110, 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 probable significant adverse environmental impacts of the proposed wireless facility, including the probable significant adverse impacts to the aesthetics of the surrounding area, along with the required EIS elements set forth in Chapter 197-11 WAC.
3. A final decision on the CUP shall be stayed until such time as an EIS is prepared and submitted to PDS. PDS shall forward the EIS to the Hearing Examiner, along with any changes to the proposal, staff report and/or proposed conditions, if any. At that time, the Examiner will reconvene the hearing on the merits of the conditional use permit for the purpose of adding new information and testimony, if offered, into the record in light of the EIS. Notice of the reconvened public hearing shall be provided by the Office of the Hearing Examiner.

REVISED DECISION issued this 12th day of January, 2011



Millie M. Judge, Hearing Examiner

EXPLANATION OF APPEAL PROCEDURES

The attached decision is an order granting, in part, the appellants' SEPA appeal. No further SEPA appeals are available at the administrative level according to RCW 36.70B.060. Further appeals under SEPA may be sought in Superior Court.

As to the application for a conditional use permit, this is a decision remanding the application back to PDS for further proceedings, including the issuance of a DS and the requirement that an environmental impact statement be prepared. As such, this decision is not a final decision and no administrative appeal to the County Council may be sought. An appeal may be filed only after a final decision is issued on the conditional use permit.

Additionally, given that the option of reconsideration has been exercised by the parties, further reconsideration is not available. SCC 30.71.120(5).

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.

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