

SNOHOMISH COUNTY COUNCIL  
SNOHOMISH COUNTY, WASHINGTON

MOTION NO. 03-357

AFFIRMING AND MODIFYING THE HEARING EXAMINER DECISION DENYING A  
CONDITIONAL USE PERMIT APPLICATION AND LANDSCAPE MODIFICATION FOR  
A COMMUNICATIONS UTILITY FACILITY PROPOSED BY CINGULAR WIRELESS  
FILE NO. 02-104238

WHEREAS, on May 20, 2002, Cingular Wireless requested a conditional use permit (CUP) and landscape modification for a wireless communications utility facility constructed for co-location, consisting of a 150-foot monopole with associated ground equipment; and

WHEREAS, the Department of Planning & Development Services (PDS) issued a Mitigated Determination of Nonsignificance (MDNS) for the proposal under the State Environmental Policy Act on September 6, 2002 and a SEPA appeal was filed on September 24, 2002; and

WHEREAS, after holding a public hearing on November 20, 2002, the Hearing Examiner (Examiner) issued a decision on January 27, 2003 denying the CUP application without prejudice and denying the SEPA appeal; and

WHEREAS, in response to a petition for reconsideration filed by Cingular Wireless, the Examiner set the matter for further public hearing on April 30, 2003; and

WHEREAS, the Examiner issued a Supplemental Report and Decision on Reconsideration on May 15, 2003, again denying the request for the CUP and landscape modification and the SEPA appeal; and

WHEREAS, on May 29, 2003, Cingular Wireless appealed the Examiner's January 27, 2003 and May 15, 2003 Decisions to the County Council pursuant to SCC 30.72.070; and

WHEREAS, Council considered the appeal at a closed record hearing on July 16, 2003, continued to July 23 and July 30, 2003; and

WHEREAS, after considering the appeal based on the record and arguments of parties of record, the Council modifies and affirms the Examiner's decision denying the CUP application as provided herein.

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NOW, THEREFORE, ON MOTION:

Section 1. The Snohomish County Council makes the following findings of fact and conclusions:

- A. Appellant Cingular Wireless challenges Conclusion Nos. 2, 3, 4, and 6 of the Examiner's January 27, 2003 Decision (Exhibit 135); Supplemental Conclusion Nos. 2, 3, 4, 5 and 6 of the Examiner's May 15, 2003 Supplemental Report and Decision (Exhibit 151); and Supplemental Finding Nos. 2, 4, 6, 7, 8, 9, 10, and 11 of the Examiner's May 5, 2003 Supplemental Report and Decision (Exhibit 151).
- B. Cingular Wireless argues that the Examiner erred by denying its CUP application based on a finding that "[n]o showing has been made to indicate that the proposed use must be in this exact location." Exhibit 152 at 5-6, citing Exhibit 135 at pg. 3.
- C. The Council adopts Finding Nos. 1-17 and Conclusion Nos. 1, 2 and 4-7 of the Examiner's January 27, 2003 Decision, and Finding Nos. 1-13 and Conclusion Nos. 1, 2, 4 and 5-8 of the Examiner's May 15, 2003 Decision.
- D. Conclusion No. 3 of the Examiner's January 27, 2003 Decision reflects an error of law. Although the Council may consider public need when evaluating a CUP application, the CUP applicant need not demonstrate that the proposed use "must be in this exact location" or "requires mandatory location at this particular spot." Exhibit 135 at pg. 3.
- E. Conclusion Nos. 2, 3 and 5 of the Examiner's May 15, 2003 Decision reflect similar errors of law. A compatibility analysis under SCC 18.72.060 does not consider whether alternate locations for a particular facility are available or whether the proposed location "is the only location which will serve [the applicant's] purposes." Exhibit 151 at pg. 7.

Section 2. Based on the foregoing findings and conclusions, the County Council hereby modifies the Examiner's January 27, 2003 Decision and Supplemental May 15, 2003 decision as follows:

- A. Conclusion No. 3 of the Examiner's January 27, 2003 Decision is stricken in its entirety.
- B. The third paragraph of Conclusion No. 2 on page 6 of the Examiner's May 15, 2003 Decision is stricken in its entirety.

- C. Conclusion No. 3 on page 7 of the Examiner's May 15, 2003 Decision is stricken in its entirety.
- D. The second paragraph of Conclusion No. 5 on page 7 of the Examiner's May 15, 2003 Decision is modified by ending the first sentence after the word "compatibility" and deleting the last clause in its entirety.
- E. The Council adopts the following additional conclusions:

(New) Conclusion 6: Although there is a presumption in favor of approving CUP applications subject to conditions, the Examiner may impose conditions to assure compatibility with the proposed site area. As evidenced in the record before the Examiner, the proposed site area has underground power lines (Exhibit 135, pg. 5), and the immediate neighborhood does not have water towers, cell towers, busy streets or commercial buildings (Exhibits 108, 119 and oral testimony before the Examiner). Because the proposed facility is inherently incompatible with the rural character of this particular site area, substantial evidence supports the Examiner's decision that compatibility cannot be achieved between the proposed facility and the proposed site.

(New) Conclusion 7: In SR Broadcasting, the Council noted that SCC 18.72.060(6) allows CUP conditions to recognize and compensate for public need, and held that "public need is a relevant factor to be considered in reaching a CUP decision." (File No. 00-107495 at pg. 2). Accordingly, if public need for a facility in a particular area is great, a higher degree of incompatibility may be tolerated and more stringent conditions may be imposed. Here, the record does not establish a public need for this facility that would compensate for the incompatibility of this facility with the proposed site.

(New) Conclusion 8: Cingular Wireless failed to show that the Examiner's decisions should be reversed in whole or part, or that the matter should be remanded back to the Examiner.

- F. Conclusion Nos. 6, 7 and 8 of the Examiner's May 15, 2003 Decision are hereby renumbered as Conclusion Nos. 9, 10, and 11, respectively.
- G. Party of record Mount Forest Homeowners Association raises two procedural issues: a request to dismiss all issues "not meaningfully raised in the reconsideration request" (Exhibit 153 at pg. 2), and a request that the Council refuse to consider Attachment A to Cingular Wireless's appeal brief (Exhibit 152) as new evidence presented after the close of the open record hearing. Council denies the first request and grants the second.

Section 3. The Snohomish County Council enters its decision in the case of Cingular Wireless, File No. 02-104238: The Council hereby affirms the January 27, 2003 and May 15, 2003 decisions of the Hearing Examiner as modified herein.

Dated this 30th day of July, 2003.

SNOHOMISH COUNTY COUNCIL  
Snohomish County, Washington

ATTEST:

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Chairperson

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Clerk of the Council