

REPORT and DECISION of the SNOHOMISH COUNTY HEARING EXAMINER

PLAT/PROJECT NAME: Cingular/Jordan

APPLICANT: Cingular Wireless

LANDOWNER: Wesley and Linda Jordan

APPELLANTS: Mike and Kim Myhre, *et al*

RESPONDENT: Department of Planning and Development Services (PDS)

FILE NO.: 02 104238

TYPE OF REQUEST: 1. Request for a Conditional Use Permit and Landscape Modification, for a Wireless Communications Utility Facility constructed for co-location, consisting of a 150-foot monopole with associated ground equipment.

2. Appeal of the Determination of Nonsignificance

DECISION (SUMMARY): 1. Denied Without Prejudice

2. Denied

DATE OF DECISION: January 27, 2003

BASIC INFORMATION

GENERAL LOCATION: The property is located approximately 1,000 feet east of the intersection of 234th Street SE and 155th Avenue SE, on the south side of 234th Street SE, at 15828 234th St SE, Snohomish.

ACREAGE: 5 acres

ZONING: R-5

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Rural Residential

Subarea Plan: Cathcart-Maltby-Clearview

Subarea Plan Designation: Rural

SELECTED AGENCY RECOMMENDATIONS:

Department of:

Planning and Development Services: Approval subject to conditions

Public Works: No objection or requirements

INTRODUCTION

The applicant filed the Master Application on May 20, 2002. (Exhibit 8)

The Hearing Examiner (Examiner) made a site familiarization visit on November 19, 2002 in the afternoon.

The Department of Planning and Development Services (PDS) gave proper public notice of the open record hearing as required by the county code. (Exhibits 39, 40 and 43)

A SEPA determination was made on September 6, 2002. (Exhibit 2) An appeal was filed on September 24, 2002. (Exhibit 1)

The Examiner held an open record hearing on November 20, 2002 at 1:00 p.m., the 73rd day of the 120-day decision making period. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearing.

PUBLIC HEARING

The public hearing commenced on November 20, 2002 at 1:00 p.m.

1. The Examiner indicated that he has read the PDS staff report, reviewed the file and viewed the area and therefore has a general idea of the particular request involved.
2. At the commencement of the hearing the Examiner indicated that he would hear arguments on the Motions that had been filed by the applicant and PDS to dismiss the appeal or in the alternative, to limit the issues. (Exhibit 6 and 7)

After hearing arguments the Examiner denied the Motions at that time and indicated that once the hearing concluded if they wanted to request reconsideration they could do so.

3. Ms. Liz Carrasquero appeared on behalf of the applicant and stated that this is a five acre lot with location of the pole on the south side of the property off of 234th Street SE. She indicated they had gaps in their communication in this area and in order to cure that they first looked for a tower area either in a commercial or in a non-residential area initially. She stated this is the Forest Park area and they tested the properties here and found this would be a good location. She indicated there is a wetland on the west and the pole will be located on the south side of the property. It will be a 150-foot monopole built for co-location of other units. She stated at least one-half of the property would remain in a wooded state.

She stated the pole will be painted a dark color and they will visit the site approximately once a month.

She stated they have done a noise study and the maximum dBA would be 24 to 27. She stated they also did a health study, which showed there would be only .01 percent of emissions.

She indicated they have done a Targeted Drainage Report.

She submitted photos, which show the potential view of the areas and the Jordan property. These pictures are in the record as Exhibit 26. She indicated there would be 50-foot buffers around the pole as well as wetland buffers.

4. Ms. Ligia Lima, Radio Frequency Engineer from Cingular Wireless, appeared and stated they chose this site because they do not have good coverage in this area. She indicated they are trying to cover an area of 1.5 to 2 miles.
5. Mr. Stan Doran, a biologist from ADaPT Engineering, appeared and stated the proposed leased area is outside of the buffer zone.
6. Ms. Sheridan Shaffer, real estate appraiser, appeared and submitted her appraisal (Exhibit 35). She stated this is a wooded area and is part of a panorama view and the tower is not likely to stand out. She indicated it did not appear to be a significant loss in value and made comparisons with a site in Monroe where no loss was shown from placement of a cellular tower. She stated she has never done an appraisal for a neighbor but does not feel the tower causes a loss in value if the trees were cut.
7. Those speaking on the appeal were represented by Attorney David Bricklin and the applicant was represented by attorney Gary Huff.

At this time various parties spoke on the appeal.

8. Mr. John Kilpatrick, Mundy Associates, spoke on real estate values. He stated that properties gain their values from pristine forested views and anything that interrupts these will have a negative impact on other properties. He stated the report of Ms. Shaffer is missing some critical parts of a true appraisal and she did not view the site or go out there.

He indicated there will be some kind of an impact, but did not know what it will be. It might be minimal, but the impact is real and could also be significant. He could not say there was a probable significant adverse environmental impact.

9. Mr. Mike Myhre, one of the appellants, appeared and submitted Exhibits 98A-B and 99 which shows what he would see from his property if some of his existing trees were taken out.

He stated the applicant's FCC calculations are not correct and is concerned that if the tower fell, what effect this would have to him and his property.

He stated Snohomish County does not have tower rules for towers in residential areas. He believes that in this instance the Examiner could make more stringent conditions.

He feels there are other locations where better service can be provided. He stated there are power lines near the area where other cell phone towers could be placed and these are within a mile either way of the property. He stated he could cut his own trees, which would allow him to increase his view but would also show the tower.

He indicated the six-foot road would have an impact upon the water flow in the area. He stated that Mr. Erik Olson of PDS, claims a drainage plan was not submitted.

He stated there are alternative methods and there are errors as to habitat. In this regard he said there are eagles, turtles and other animals not shown in the Environmental Checklist, and was concerned as to the future affect of the tower when he develops his property.

10. Mr. Tony Morrissey appeared and stated there are underground springs in the area and they have springs in their yard. He indicated other companies have coverage in this area and there are developments going on around the area. He stated all of the utility facilities in the area are underground.
11. Ms. Rebecca Mowry appeared and stated there is a bill before Congress to un-do the restrictions on local control of these towers. She claims there will be adverse affects. She stated the tower does not reflect the character of the neighborhood and the jury is still out on health effects. She is concerned about the statute of limitations if something is not done.

She indicated they had moved to this area because of the attractive location.

12. Ms. Nelda Gorman appeared and indicated she is disabled and her only recreation is television and is concerned with interference.
13. Ms. Laura Hartman appeared and stated she supports the SEPA appeal. She indicated the county has invested time and effort in protecting rural areas and is also concerned about health effects. She stated that she appreciates having all types of wildlife around them.
14. Mr. Ray Opfer appeared and stated he feels they are graveling more than the 5,000 square foot minimum. He indicated the landing strip on Mr. Myhre's property could be used for emergency plane landings and concluded by stating the people do not want this and it is not needed in this area.
15. Mr. Brad Hansen appeared and stated this is a quiet and peaceful place and any motor noise could be easily heard. He indicated some of the trees are already starting to fall down.
16. Mr. Natalie Oswald appeared and spoke on this matter.
17. Mr. Jerrell Gorman appeared and stated that this is his retirement home. He indicated there is water on this whole area and water gurgles up out of the ground. He stated that when work is done here water would come over onto his property.
18. Mr. Kip Rumens appeared and stated the whole area is standing water in the winter.
19. Mr. Brian Allen appeared and stated he had bought his property because it is a rural area.
20. Mr. Liam Browning, a pilot, appeared and stated he raises quarter horses and is concerned about the affect on his mares and is also concerned about the financial impact.
21. At this point, the matter was continued to December 12, 2002 at 9:00 a.m.

The hearing concluded at 6:30 p.m.

The continued open record hearing commenced on December 12, 2002 at 9:05 a.m.

1. Mr. Mike Myhre, appellant, spoke and submitted Exhibit 119, which shows other locations where the tower could be located. It shows areas where they could co-locate as well and he indicated there are no other such high towers within their area. He stated that originally SBA Network Services wanted to use

their property when they were looking for a site and he allowed them to test his property. He does not believe they looked at other sites and this was the first consultant in the area. He stated they had a map showing five sites but only four had data.

He stated these roads, which they claim to want to serve, do not go through in this area. He does not believe the proposed site will be needed.

On Exhibit 119, the red ring shows a half-mile area with most of the area they are trying to serve.

He submitted Exhibits 108-H and 108-I and stated these photos show types of screening and potential views of the tower from his property and other neighbor's property.

He indicated the neighborhood has underground power. He stated he designs electronic matters for corporations. He indicated the area is very quiet and he can hear his neighbors talking outside 1,000 feet away.

He indicated that his plane runway on his property is long enough for slow take-offs and landings. He indicated that this runway will be lost if the tower is placed.

2. In responding to questions, Mr. Myhre stated he has a lot of knowledge of electronics but no degrees. He submitted Exhibit 93, which is a report of forest improvement.

He indicates he flies an ultra-light plane about twice a month and has been using this area since 1994 or 1995.

He referred to Exhibit 27-A and stated in these photos he has simulated the removal of trees off his property and the placement of trees on the Jordan property.

3. Mr. Alan Kyle appeared and stated he lives four miles northwest. He indicated they have an airstrip 1,800 feet long and the county has never required a Conditional Use Permit.
4. Ms. Rebecca Mowry appeared and stated SBA is no longer doing the site evaluation. She stated there is a water tower close by. She stated there are a lot of questions regarding whether the measurements are accurate and that the tower is completely out of keeping with the character of the neighborhood and there are better areas where it can be placed.
5. Ms. Lima appeared and submitted computer coverage maps (Exhibit 121) with the proposed tower being marked. She stated the orange shows outside the area and the red shows the worst coverage. The area to be covered is circled in blue under Exhibit 124.

She indicated they have evaluated other sites, which are not acceptable since they do not cover the area.

She indicated that microcells work better where extra capacity is needed and they only cover about 1,000 feet. She stated they would only handle 12 calls for a small area. She did state that at a higher elevation they would have better coverage.

6. Ms. Cristy Park, Cingular Wireless, appeared and indicated they preferred co-locations, but here, because of the underground wirings, they needed their own tower in this location. She indicated microcells are just as expensive because they are so limited.

7. Ms. Nicole Myhre appeared and stated she represents the younger generation. She indicated she lives in the area and enjoys living in the country. She stated she feels a big pole is not an asset to the neighborhood. She has views of the mountains; Mount Baker, Mount Pilchuck and Mount Rainer. She stated the power lines are 1-1/4 miles away from the site and the water tower is on the highest ground.
8. In rebuttal, Ms. Carrasquero stated the power line is 1.2 or 1.3 miles away. She indicated that Cingular Wireless uses co-locations as well as towers.

She stated the site meets all the requirements. She indicated they would take the tower down within one year after the end of its use.

She indicated the property owner would leave the trees on the back part of the sites.

She stated the tower will be visible from some properties and there is a need for these communication services in this area.
9. The representatives of the applicant indicated that they would check other possible sites, such as the power lines and the water tower. This would be done by Ms. Lima, with a report due approximately December 18, 2002.
10. The matter was continued to allow the report to be submitted and the Examiner indicated memorandums and/or briefs in response to the report would be due by January 10, 2003. He further indicated the reconsideration request could be filed.

The hearing concluded at 3:25 p.m.

NOTE: Audio tapes of these hearings are available in the Office of the Hearing Examiner.

FINDINGS, CONCLUSIONS AND DECISION

FINDINGS:

1. The master list of Exhibits and Witnesses which is a part of this file and which exhibits were considered by the Examiner, is hereby made a part of this file, as if set forth in full herein.
2. The PDS staff report has correctly analyzed the nature of the application, the issues of concern, the application's consistency with adopted codes and policies and land use regulations, and the State Environmental Protection Act (SEPA) evaluation with its recommendation and conditions. This report is hereby adopted by the Examiner as if set forth in full herein.
3. The request for reconsideration, asking that the reconsideration process be applied, was filed by the applicant and accepted by the Examiner. (Exhibit 126)
4. The request is for a Conditional Use Permit and Landscape Modification for a Wireless Communications Utility Facility constructed for co-location consisting of a 150-foot monopole along with associated ground equipment. The property contains a single-family residence constructed in 2000 and the tower will be located in the southeast corner of the property. The parameter of the tower and building site will be secured with a six-foot high chain link fence with three strands of barbed wire on the top while the area around the facility is heavily vegetated. The existing vegetation will be used to screen the fenced area.

The tower is being constructed to allow for the future of co-location of up to three wireless carriers along with their ground based equipment.

5. The property is zoned R-5, which allows the proposed use as a Conditional Use.
6. Section 32.50.100 SCC provides that a consistency determination shall be documented in the project permit decision.

While there is no plan that specifically mentions or sets standards for the placement of wireless telecommunications facilities they generally support coordination of utility services. Here, the proposed utility facility is consistent with the General Policy Plan (GPP) designation of Rural Residential and the conditional use is allowed within the implementing zone within these designations.

7. Information was submitted of the proximity and closeness of this property to a wetland area. However, PDS determined that a full drainage plan was not required since it was instead felt that a grading permit will be required. However, there was testimony given, that the area proposed for the grading permit would exceed that allowed by law because of the necessity for a new road to get to the location.
8. Section 18.72.060 SCC provides the following regarding conditional use permits:

“When considering an application for a conditional use permit, the hearing examiner shall consider the applicable standards, criteria and policies established by this title as they pertain to the proposed use and may impose specific conditions precedent to establishing the use. The conditions may:

- (1) Increase requirements in the standards, criteria or policies established by this title.
- (2) Stipulate the exact location as a means of minimizing hazards to life, limb, property damage, erosion, landslides or traffic;
- (3) Require structural features or equipment essential to serve the same purpose set forth in (2) above;
- (4) Impose conditions similar to those set forth in items (2) and (3) above as deemed necessary to establish parity with uses permitted in the same zone in their freedom from nuisance generating features in matters of noise, odors, air pollution, wastes, vibration, traffic, physical hazards, and similar matters; PROVIDED, the hearing examiner may not, in connection with action on a conditional use permit, reduce the requirements specified by this title as pertaining to any use nor otherwise reduce the requirements of this title in matters for which a variance is the remedy provided;
- (5) Assure that the degree of compatibility with the purpose of this title shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses, within the general area in which the use is proposed to be located.
- (6) Recognize and compensate for variations and degree of technological processes and equipment as related to the factors of noise, smoke, dust, fumes, vibration, odors, and hazard or public need; and
- (7) Require the posting of construction and maintenance bonds or other security sufficient to secure to the county the estimated cost of construction and/or installation and maintenance of required improvements.”

9. Landscape Modification under SCC 18.43.031 is not required in this instance because the site is heavily vegetated with underbrush and tall alder and evergreen trees.
10. The SEPA appeal raises nine main issues. PDS has responded to those issues on Pages 6-12 of the PDS Staff Report. (Exhibit 69)
11. The Examiner has reviewed the SEPA appeal and the responses along with the evidence and testimony presented, and finds that there is no new evidence presented which would show a probable significant adverse impact on the environment by clear and convincing evidence.
12. However, the Examiner does find that from the evidence presented by the Mount Forest Homeowners Association and those persons appearing in opposition to the request, that they have submitted substantial evidence to raise questions regarding the location and compatibility of the request for the tower in this particular area and at this particular location.
13. Much testimony was submitted regarding views of the proposed tower and of the viability of various site locations. In particular, subsequent to the hearing, detailed information was submitted to the Examiner for his review with regard to site locations, memorandums and briefs as follows:
 - A. Exhibit 130 Letter to the Examiner from Ligia Lima regarding alternative site selections
 - B. Exhibit 132 Letter to the Examiner from Mike Myhre with attached letters/photos/maps
 - C. Exhibit 133 Post-Hearing Brief of Mount Forest Homeowners Association
 - D. Exhibit 134 Closing Argument from Gary Huff
14. Testimony was given regarding the use of private airplanes in this location by private landowners, which use has gone on for many years and which the Examiner does not find to be in violation of the law relating to a private property owner's use of their land. The proposed tower is in such close proximity, as to have a potential adverse affect upon these pre-existing uses.
15. Testimony was presented and motions were made with regard to adverse affects coming from the electromagnetic use of these towers. It is the finding of the Examiner that such information is irrelevant and may not be considered by the Examiner because of existing federal regulations.
16. The Examiner recognizes that the applicant must carry the burden of proof to support his request. In this particular instance the Examiner cannot find where this burden of proof has been born by the applicant, especially with regard to compatibility with the area.
17. Any finding of fact in this Report and Decision, which should be deemed a conclusion, is hereby adopted as such.

CONCLUSIONS:

1. The Environmental Checklist, while adding additional information, is not such as to conclude that there will be a significant adverse impact upon the environment which can be shown. However, the appeal, along with the evidence presented, has raised questions as to whether the applicant has sustained the burden of proof needed to comply with the Snohomish County Code.
2. In this regard, Condition 5 of SCC 18.72.060 requires that there must be an assurance of the degree of compatibility being maintained, with respect to the particular use on the particular site and consideration of other existing and potential uses, within the general area in which the use is proposed to be located. The Examiner does not believe that this burden has been met by the applicant.

3. No showing has been made to indicate that the proposed use must be in this exact location, and can be in no other or any combination of others; and therefore requires mandatory location at this particular spot.
4. Rather, the evidence unequivocally shows that this is a very attractive rural area with roads that do not go through, underground utilities, many wetlands, pre-use of property by private planes and/or ultra lights, having many varieties of wildlife including eagles, adverse visual impacts, and other possible locations. The applicant has failed to meet the burden of proof required to show compatibility under SCC 18.72.060.
5. It should be noted that any federal preemption of the regulation of this proposal does not transfer the procedural authority of the Washington State Environmental Policy Act (SEPA) and its requirement that probable significant adverse environmental impacts be disclosed or that the standards of the Snohomish County Conditional Use Permit requirements be ignored or waived.
6. The applicant is not precluded, if they so desire, to submit additional information with regard to the nature and use of the property, other sites, or combination of sites, which would accomplish the same purpose. The Examiner is just not convinced that the burden of proof has been carried for the establishment of this tower, in this location, at this time.
7. Any conclusion in this Report and Decision, which should be deemed a finding of fact, is hereby adopted as such.

DECISION:

1. The request for a Conditional Use Permit and Landscape Modification is hereby Denied Without Prejudice.
2. The SEPA appeal is hereby Denied for the reasons set forth in the Findings and Conclusions.

Decision issued this 27th day of January, 2003.

Robert J. Backstein, Hearing Examiner

EXPLANATION OF RECONSIDERATION PROCEDURES FOR CONDITIONAL USE PERMIT

This decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. The reconsideration process has been elected pursuant to SCC 2.02.167(1). Reconsideration must be sought by one or more parties before an appeal of the Examiner's decision can be filed with the County Council. No appeal may raise an issue which was not raised in a Petition for Reconsideration. The following paragraphs summarize the reconsideration process. For more information about reconsideration and appeal procedures, please see Chapter 2.02 SCC.

Any Party of Record may request reconsideration by the Hearing Examiner. A Petition for Reconsideration must be filed in writing with the Office of the Hearing Examiner, **2802 Wetmore Avenue, 2nd Floor, Everett,**

Washington, Everett, Washington (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **FEBRUARY 6, 2003**. There is no fee for filing a Petition for Reconsideration.

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 Examiner exceeded his jurisdiction;
- (b) the Examiner failed to follow the applicable procedure in reaching his decision;
- (c) the Examiner committed an error of law or misinterpreted the applicable comprehensive plan, provisions of Snohomish County Code, or other county or state law or regulation;
- (d) the Examiner's findings, conclusions and/or conditions are not supported by the record;
- (e) newly discovered evidence alleged to be material to the Examiner's decision which could not reasonably have been produced at the Examiner's hearing; and/or
- (f) changes to the application proposed by the applicant 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 2.02.167. Please include the county file number in any correspondence regarding this case.

EXPLANATION OF RECONSIDERATION PROCEDURES FOR SEPA APPEAL
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This decision of the Hearing Examiner is final and conclusive with right of judicial review in Superior Court following the county's final decision on the underlying application or proposal. The reconsideration process has been elected pursuant to SCC 2.02.167(1). Reconsideration must be sought by one or more parties before any petition for judicial review of the Examiner's decision is filed in Superior Court. The following paragraphs summarize the reconsideration process. For more information about reconsideration and appeal procedures, please see Chapters 2.02 and 23.40 SCC, RCW 43.21C.075 and WAC 197-11-680.

Any Party of Record may request reconsideration by the Hearing Examiner. A Petition for Reconsideration must be filed in writing with the Office of the Hearing Examiner, Room AA103, **2802 Wetmore Avenue, 2nd Floor, Everett, Washington** (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **FEBRUARY 6, 2003**. There is no fee for filing a Petition for Reconsideration.

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- (f) changes to the application proposed by the applicant 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 2.02.167. Please include the county file number in any correspondence regarding this case.

Staff Distribution:

Department of Planning and Development Services: Erik Olson

<p>The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.130.</p>
