

**SUPPLEMENTAL REPORT and DECISION
of the SNOHOMISH COUNTY HEARING
EXAMINER on RECONSIDERATION**

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
2. Denied

DATE OF INITIAL DECISION: January 27, 2003

DATE OF DECISION ON RECONSIDERATION: May 15, 2003

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

WHEREAS, the Examiner issued a decision on this matter on January 27, 2003 (Exhibit 135); and

WHEREAS, the Examiner received a Petition for Reconsideration from the applicant (Exhibit 136); and

WHEREAS, the Examiner issued an Order Accepting the Petition for Reconsideration and Calling for Comments (Exhibit 137); and

WHEREAS, the Examiner received comments from all parties; and

WHEREAS, the Examiner then issued an Order Setting the Matter for Further Hearing (Exhibit 144) scheduled for April 30, 2003 at 2:00 p.m. to allow a full hearing to be had on the Request for Reconsideration and the responses thereto; and

WHEREAS, a Letter of Clarification was issued to the response to the request of the attorney for the appellants regarding the request for reconsideration and the submittal of additional information, indicating that it was the Examiner's desire to allow full comment and hearing on the issues by all parties (Exhibit 147); and

WHEREAS, a hearing was held on these issues in this matter on April 30, 2003.

NOW THEREFORE, the Examiner hereby issues the following Supplemental Report.

PUBLIC HEARING ON RECONSIDERATION

The public hearing on reconsideration commenced on April 30, 2003 at 2:45 p.m.

1. Mr. David Bricklin, attorney for the appellants, appeared and made Motions that no information should be submitted at this late date, as those Motions were set forth earlier in letters to the Examiner under Exhibits 141, 143 and 146.

The Examiner indicated that he would take the matter under advisement and issue a ruling later.

2. Mr. David Hall, attorney for the applicant, appeared and referred to the *S-R Broadcasting* decision of the County Council, Pages 2 and 5, and indicated that there is a presumption that the use is permitted as a Conditional Use in this zone. (Exhibit 150)

He indicated that there is no showing that the tower will alter the uses in the neighborhood.

He stated that there are other utility lines in the surrounding area and stated that there is no required showing of need or is there any such standard in the record.

He indicated the burden of proof is on the applicant to make a *prima facie* showing, and they have shown that.

He stated compatibility is not supported by the evidence and that a moderate or less than moderate impact is not prohibited.

3. Mr. Erik Olson, PDS, appeared and stated that the February 26, 2003 Decision of the County Council on the *S-R Broadcasting* case was issued after this decision. He stated PDS has met their burden. He also referred to the County Council ruling in the *Nextel Communications* case. (Exhibit 77)

4. Mr. Bricklin stated that the *S-R Broadcasting* decision referred to approval based upon “public need” and that a lot of time was spent on the “public need” issue.

He stated, here, the question is: Does this site provide good coverage or not?

He referred to Page 5 of the decision and indicated that no public entity has claimed a public need here. He stated that esthetics is a weighing factor under the *S-R Broadcasting* case. Further, he stated that interference with a personal use and enjoyment of neighbors’ property relates to compatibility.

He stated this neighborhood itself has no above ground wiring.

5. Mr. Mike Myhre, appellant, appeared and stated there are other existing locations that do not require a tower.

6. Ms. Liz Carrasquero, applicant’s representative, appeared and stated that this area has dropped calls and this is not acceptable to their company.

7. Mr. Bricklin stated that no evidence has been shown as to why the request was reduced from 150 feet to 130 feet, when they originally argued that 150 feet was necessary.

8. Mr. Olson stated that it is not a requirement of PDS to look at other locations.

9. Mr. Hall concluded by stating that although they are proposing that the tower be reduced by 20 feet, that they still would have better coverage at 150 feet. He further indicated that no other area provides coverage as good as this site.

The hearing concluded at 4:16 p.m.

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

SUPPLEMENTAL FINDINGS, CONCLUSIONS AND DECISION

SUPPLEMENTAL FINDINGS:

1. This Report and Decision is issued as a Supplemental Report to the Decision heretofore issued on January 27, 2003 by the Hearing Examiner. Those Findings and Conclusions are adopted and remain as issued in said Report and Decision unless changed specifically herein.
2. The Examiner has reviewed in detail the decisions of the Snohomish County Council in the case of *Nextel Communications* File No. 97-110518 (Exhibit 77) herein. In this case, among other matters, the Council in its decision of August 24, 1998 adopted on Page 2 additional findings setting forth as Finding 26 certain of the appellant's arguments. These are as follows:

“(New) Finding 26. Appellants appealed the Examiner's decision to the Council. Appellants broadly objected to the granting of the permit based upon lack of compatibility, size, visual characteristics, noise, diminution of property values, precedential effects of approval, and other grounds. Appellants' arguments include but are not limited to the following:

- 1) the proposed facility is incompatible with the strictly single family neighborhood that surrounds the site of the proposed project, particularly where nothing in the area is comparable in terms of the proposed facility's visual and noise impacts;
- 2) the project would introduce an adverse real estate condition into the neighborhood which would have an adverse effect on the resale values of neighboring residences of up to 15 percent;
- 3) the record contains no evidence of cell towers sites in neighborhoods which contain only residential structures and which do not contain comparable facilities such as water towers, fire stations, churches, etc.;
- 4) noise and visual impacts would occur on a constant and uninterrupted basis even after mitigation required by the Examiner, and would violate county noise standards;
- 5) Nextel failed to show that transmission coverage could not be provided in another area location with less impact on neighboring single family residences;
- 6) mitigating conditions offered (painting the tower brown and locating it near mature conifers) cannot make the use compatible with the particular neighborhood in which it is proposed to be sited; and”

...

These arguments generally are similar to arguments made in this case.

3. The Examiner has also reviewed in detail the decision of the Snohomish County Council in the case of *S-R Broadcasting*, Case No. 00-107495 issued on February 26, 2003, and is shown in full as Exhibit 150. Specific attention is called to Pages 2 and 3 where the Council refers to Subsection (6) of SCC 18.72.060 and indicates that it “requires that conditions may recognize and compensate for public need. It is the Council's conclusion that public need is a relevant factor to be considered in reaching a CUP decision, under SCC 18.72.060.”
4. In this matter there was much testimony relating to views. In the Request for Reconsideration by the applicant in this matter they offered to reduce the tower from its initial request of 150 feet to 120 feet which would make it just above the height of some trees in the area. The Snohomish County Council in

its decision of the *S-R Broadcasting* case referred to above, stated that aesthetic considerations may be a factor, in a accountability determination, but not the sole basis to deny a CUP. In other words, standing by itself, aesthetics is not to be the controlling factor.

While views would have some adverse impacts here, it is not the controlling factor alone in this decision.

5. The evidence indicated that the appellant, Mr. Myhre, uses and has used his property for a private landing field for approximately 10 years. A letter was submitted from Trang D. Tran, U.S. Department of Transportation Federal Aviation Administration, (Exhibit 94) indicating that upon a review of the proposed tower near the Mount Forest Airport it is their opinion that, "The proposed tower does penetrate FAR Part 77 primary surface for the Mount Forest Airport runway by approximately 100 feet. If this were a public use airport, we would object to this construction of the tower in this location." Surely, this long-term use by the appellant, Mr. Myhre, while not controlling, is a factor to also be considered.
6. The presumption applied to conditional uses being approved is a valid presumption. However, it places upon the appellant the requirement to carry the burden of proof to establish not only *prima facie* evidence to support the presumption, but also to establish and carry the burden of proof, which includes coming forth with information submitted in rebuttal to the *prima facie* case, which information requires that the burden of proof shall be met by a preponderance of the evidence. (SCC 18.72.100)
7. As stated earlier, SCC 18.72.060 sets forth the conditions to be met. Particularly Subsection (5) provides for compatibility which states as follows, "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 and which the use is proposed to be located;" Furthermore, Subsection (6) provides that, "recognize and compensate for variations and degree of technical logical process and equipment as related to the factors of noise, smoke, dust, fumes, vibration, odors, and hazard or public need; and ..." (emphasis added)
8. There was a great deal of testimony given with regard to a suitable or better location somewhere outside of this immediate area. The applicants stated there was no alternatively single better location, although there was admission by the applicants that one of the recommended water tower sites provide for a large area of the coverage although not all of it.

The appellants submitted evidence and testified that there were a variety of other locations that could be used and/or considered other than this particular location.

In response, the applicant summarized that a gap in service exists in this dominantly rural residential neighborhood with dense tree cover. They concluded by stating that, "This site was chosen to provide the best wireless coverage available so as to rectify the gap in the network while minimizing to the extent possible impacts on this rural community. There simply is no greater technologically feasible cost effective solution." [Emphasis added] See Page 4 of the January 9, 2003 Closing Argument of the Attorney for the applicant. (Exhibit 134)

9. The evidence shows that much of the area desired to be covered by the applicants, consists of dead end roads and wetlands. At the reconsideration hearing no testimony was offered by the applicants or their expert with regard to what type and in what manner the reviews were made and whether or not all of the proposed alternate sites submitted by the appellants were properly and/or reviewed. Thus, there was no possibility for questioning or cross examination on this issue at the reconsideration hearing. Therefore, there was no clear showing by a preponderance of the evidence, why this tower could not be located in other close by or adjacent areas, and still provide the same coverage required.

10. There was testimony from Ms. Lima, their engineer, regarding coverage but that there was only enough money in the budget for a single tower. See Post-Hearing Brief of Mt. Forest Homeowners Association. (Exhibit 133, Page 10)
11. A review of the integrated water tower coverage map and water tower photos (Exhibit 132) indicated that the coverage was better at 80 feet than the 150 feet foot tower proposed by the permit application; and could also serve an additional estimated 200 homes in the Echo Lake area and allow people to drive from the most remote areas of the Echo Lake Road network and continue out Echo Lake Road without dropping below the in-car coverage level. In contrast, the proposed Jordan tower would be severely limited in providing service to the east due to the topography. (See pages 9 and 10 of the proposed hearing brief of Mount Forest Homeowners Association, Exhibit 133)
12. The Examiner must compliment all the parties and responses received, not only at the initial hearing but, the reconsideration hearing as well. The Examiner notes that Mr. David Hall, the attorney for the applicants, appearing at the reconsideration hearing, made an excellent presentation, even though he had not attended or had all of the background of the previous hearing.
13. Any finding of fact in this Report and Decision, which should be deemed a conclusion, is hereby adopted as such.

CONCLUSIONS:

1. It is first the conclusion of the Examiner that the renewed Motions of the appellants are hereby denied, since no new issues were previously raised to the Examiner and not already responded to by the Examiner in his letters of response and clarification. (See Exhibits 144 and 147)
2. The Snohomish County Council, in their earlier decisions, indicated that various issues could be raised depending upon the facts with regard to the siting of towers. One of these main issues is that of public need, as shown in Subsection (6) of SCC 18.72.060.

Furthermore, Subsection (5) of SCC 18.72.060 clearly provides that conditions must be placed that “assure the degree of compatibility with the purpose of the 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;”

The Examiner concludes that the applicant has failed to carry the burden of proof such as to justify the need and compatibility of the proposed use in this particular location given the fact that there are other alternate locations which could cover the gap in service in this area. The Examiner is therefore unable to provide conditions which would cure these problems.

3. On a review of all of the evidence presented on locations and coverage, the Examiner was not left with a clear and convincing preponderance of the evidence to show that there would exist a gap in service if other alternative locations were used, which would or could be available. In other words, that there was shown a clear public need for service in this area by the placement of a tower in this location.
4. Furthermore, the Examiner concludes from the testimony and memorandums of the applicant themselves, that one of the reasons for this location considered was the cost of service. The Examiner nowhere finds this economical reason given as justification for the location of the tower on this particular site.

5. There also clearly exists concerns as to aesthetics, the landing and take off of private aircraft, and the effect upon the area as a whole. Nevertheless, when considered standing alone, they add to, but are not sufficient to deny the request by themselves.

However, the Examiner finds nowhere in the Federal legislation that local jurisdictions are precluded from their own review standards with regard to size, location, public need and compatibility; and in this regard, the applicant has failed to show by a preponderance of the evidence that this location is the only location which will serve their purposes in eliminating any gap in service.

6. For the reasons set forth above, the request for the Conditional Use Permit and landscape modification should be denied.
7. It should be noted that this Decision is based upon the facts presented, and is not deemed to be a precedent for any future requests.
8. Any conclusion in this Report and Decision, which should be deemed a finding of fact, is hereby adopted as such.

DECISION:

Upon reconsideration, the Conditional Use Permit and Landscape Modification requests for a wireless communications utility facility are hereby DENIED. The SEPA appeal and Motions relating thereto are also DENIED.

Decision issued this 15th day of May, 2003.

Robert J. Backstein, Hearing Examiner

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| EXPLANATION OF APPEAL PROCEDURES |
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An appeal to the county council may be filed by any aggrieved party of record. A decision which has been subjected to the reconsideration process shall not again be subject to reconsideration; provided that a decision which has been revised on reconsideration from any form of denial to any form of approval with preconditions and/or conditions, shall be subject to reconsideration. [SCC 30.72.065(5)]

- (1) The county council's decision on a Type 2 appeal is the final decision of the county, except where a matter has been remanded to the Hearing Examiner. A final council decision may be appealed to superior court within 21 days of issuance of the decision in accordance with Chapter 36.70C RCW.
- (2) The cost of transcribing the record of proceedings, of copying photographs, video tapes, and any oversized documents, and of staff time spent in copying and assembling the record and preparing the record for filing with the court shall be borne by the party filing the petition. If more than one party appeals the decision, the costs of preparing the record shall be borne equally among the

appellants. [Chapter 30.72.130 SCC] Please include the county file number in any correspondence regarding this case.

Staff Distribution:

Department of Planning and Development Services: Erik Olson

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.