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**BEFORE THE HEARING EXAMINER  
FOR THE CITY OF MEDINA**

City of Medina

In the Matter of the Application of	)	No. PL-13-031; PL-13-032
	)	
	)	
Daniel Schweigard, on behalf of	)	
Independent Towers Holdings, LLC	)	
	)	DECISION ON REQUEST FOR
<u>For a Special Use Permit and Variances</u>	)	RECONSIDERATION

**SUMMARY OF RECORD**

Background:

The City of Medina Hearing Examiner held an open record hearing on the Applicant’s request for a Special Use Permit and Variances to construct an 80-foot monopole within Fairweather Nature Preserve on July 16, 2014. The Hearing Examiner closed the record on August 11, and issued a decision denying the request on August 21, 2014. The City received the decision via FedEx on August 25, 2014 and issued a Notice of Decision that same day. *Independent Towers Holdings, LLC, SUP and Variances, No. PL-13-031; PL-13-032 (August 21, 2014).*

On September 8, the Applicant filed a Motion for Reconsideration. T-Mobile West LLC, an Independent Towers’ lessee, joined the request for reconsideration. *Independent Towers’ Motion for Reconsideration (September 8, 2014); Notice of Appearance (September 8, 2014) [on behalf of T-Mobile West LLC]*. G. Richard Hill and Ian Morrison, Attorneys for “Medina Residents,”<sup>1</sup> filed a motion to deny Independent Towers’ reconsideration request, on the grounds that it was not timely filed.<sup>2</sup> The Applicant filed a motion opposing the motion to deny reconsideration.<sup>3</sup> Because the Hearing Examiner concludes that reconsideration should be denied on substantive grounds, this procedural issue need not be addressed.

<sup>1</sup> The Motion to Deny identified members of Medina Residents as include Cynthia Adkins and John Harris, who submitted comments and testimony on behalf of the unincorporated association at the July 16, 2014 hearing as parties of record. *Medina Residents’ Motion to Deny, at 1; MMC 20.12.170.*

<sup>2</sup> Medina Residents argue that any request for reconsideration “shall be in writing and filed within 14 days of the date of the decision,” (MMC 2.78.090) and that the date of the decision was August 21, 2014. *Medina Residents’ Motion to Deny Independent Towers’ Reconsideration Request (September 15, 2014).*

<sup>3</sup> The Applicant argues that under the Medina code, governing statutes, and case law, the date the City issues its Notice of Decision (here, August 25, 2014), is the decision date, not the date the decision was signed by the Hearing Examiner. *Opposition to Motion to Deny Reconsideration Request (September 26, 2014)*. The City concurs with this assessment. *Declaration of Robert Grumbach, Director of Development Services for the City of Medina (September 25, 2014).*

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Hearing Date:

As required by Medina Municipal Code (MMC) 2.78.90, the Hearing Examiner considered the request for reconsideration at “its next regular meeting,” September 17, 2014. The record was held open to receive additional briefs from the parties. The record closed September 26, 2014.

Representation:

No testimony was offered at the September 17 hearing. The following attorneys appeared at the hearing and presented oral argument:

Attorney Richard Stephens represented the Applicant  
Attorney Ian Morrison represented a group of Medina residents  
Attorney Linda Atkins represented T-Mobile

Exhibits:<sup>4</sup>

The following additional exhibits were admitted into the record at the September 17, 2014 reconsideration hearing:

67. Email from Skip Voorhees to Aimee Kellerman, dated September 19, 2014, with email string
68. Email from Aimee Kellerman to Robert Grumbach, dated September 26, 2014, with email string containing David Yee comment

Pleadings:

The Hearing Examiner received the following pleadings after the Notice of Decision was issued:

- Independent Towers’ Motion for Reconsideration, dated September 8, 2014, with Memorandum in Support of Reconsideration
- Notice of Appearance (Attorney Linda W. Atkins for T-Mobile West LCC), dated September 8, 2014
- Medina Residents’ Motion to Deny Independent Towers’ Reconsideration Request, dated September 15, 2014
- Notice of Appearance (Attorneys G. Richard Hill and Ian S. Morrison on behalf of Medina Residents), dated September 15, 2014
- Declaration of Robert Grumbach, Director of Development Services for the City of Medina, dated September 25, 2014
- Applicant’s Opposition to Motion to Deny Reconsideration Request, dated September 26, 2014
- Declaration of Richard M. Stephens in Support of Applicant’s Opposition to Motion to Deny Reconsideration Request, dated September 26, 2014, with attached Exhibits 1, 2, and 3
- Declaration of Ian S. Morrison, dated September 26, 2014, with attached Exhibits A, B and C

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<sup>4</sup> Exhibits 1 through 66 were admitted at the initial open record hearing on July 16, 2014.

Hearing Examiner Orders:

- Notice of Meeting Regarding Applicant's Request for Reconsideration, dated September 10, 2014
- Order in Response to Motion to Dismiss, dated September 15, 2014

**DISCUSSION & DECISION**

Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide requests for non-administrative Special Use Permits (SUPs) and variances. The approval criteria for SUPs require compliance with all applicable zoning and development standards, as well as applicable use regulations. *MMC 20.72.010.E.4*. Title 20 MMC establishes the appropriate locations, site development standards, and permit requirements for wireless communication services in Medina. Chapter 20.37 MMC establishes use regulations for WCF proposals including permitted locations, concealment, co-location, needs analysis, height restrictions, and radio frequency standards. *MMC 20.37.070.B; MMC 20.37.100; MMC 20.37.110; MMC 20.37.130.H; MMC 20.37.140*.

Request for Reconsideration Criteria

Any aggrieved party may file a motion for reconsideration of a hearing examiner decision. The request for reconsideration must be in writing and filed within 14 days of the date of the decision. . . A request may be granted if one or more of the following elements are established:

- A. The application has been substantially modified. Modifications which address concerns expressed by the hearing examiner in denying an application shall be given special consideration;
- B. Irregularity in the hearing of the reviewing agency preventing a party from having a fair hearing;
- C. Newly discovered, material evidence which the party applying for reconsideration could not have discovered and produced at the hearing with reasonable diligence;
- D. Errors in law objected to at the time by the party filing the request for reconsideration.

*MMC 2.78.090*.

Decision

Daniel Schweigard, on behalf of Independent Towers Holdings, LLC (Applicant),<sup>5</sup> requested a non-administrative special use permit (SUP), and variances from *MMC 20.37.070.B.4* and *20.37.100.D.1*, to construct an 80-foot monopole support structure, with interior antennas and a 1,525-square-foot equipment structure. The proposed wireless communication facility (WCF) would be located in Fairweather Nature Preserve. *Exhibit 1, Staff Report, page 1*. The Hearing

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<sup>5</sup> Fairweather Nature Preserve is owned by the City of Medina. The City appointed Independent Towers Holdings, LLC, to act as agent for all acts and decisions related to processing the application for permits, review, and approval of the application; authorization of revisions; and coordination of required inspections and project approvals. *Exhibit 11*.

Examiner denied the application primarily because the Applicant failed to present substantial evidence to establish that 80 feet was the minimum WCF height necessary to avoid a significant service gap on the SR-520 bridge as required by MMC 20.37.070.B.3.b. *Independent Towers Holdings, LLC, SUP and Variances, No. PL-13-031; PL-13-032 (August 21, 2014) (hereinafter "August 21 Decision")*.

As grounds for reconsideration, the Applicant makes four arguments: (1) that the Hearing Examiner failed to account for the history of T-Mobile's WCFs in the area; (2) that the Hearing Examiner misstated the height of the temporary WCF in Fairweather Nature Preserve; (3) that the Hearing Examiner misunderstood its arguments and evidence related to the proposed tower height of 80 feet; and (4) that federal law preempts municipal law concerning radiofrequency interference analysis and the Hearing Examiner erred in identifying the failure to comply with MMC 20.37.130.H as a reason to deny the permit request. None of these arguments is related to the reconsideration criteria of MMC 2.78.090, and none of these arguments is persuasive.

### *1. History of the T-Mobile in the Area*

The Applicant alleges that the Hearing Examiner fails to account for the "fundamental fact [of] the years-long history of the T-Mobile site." *Memorandum in Support of Motion for Reconsideration, page 3*. Although not explicitly referenced in the decision, the Hearing Examiner acknowledges that T-Mobile has had a WCF in the area for over ten years. Just prior to changing its name to T-Mobile, VoiceStream Wireless located a 55-foot tall WCF in 2002 at the Evergreen Point Road overpass of SR 520. In 2011, the Washington State Department of Transportation (WSDOT) required T-Mobile to move the facility to make room for highway improvements. T-Mobile moved the facility to a temporary site on the south side of SR 520, adjacent to Evergreen Point Road. In 2012, T-Mobile and Independent Towers obtained a temporary use permit to install a 45-foot tall WCF in Fairweather Nature Preserve. *Exhibit 1, Staff Report, page 15; Exhibit 36; Memorandum in Support of Motion for Reconsideration, page 4*.

That is the undisputed history of operations of T-Mobile in Medina. But it is irrelevant information, because nothing in Chapter 20.37 MMC requires the Hearing Examiner to consider the history of WCFs in a particular area and it would be error for him to do so. Here, the Examiner acknowledges that the current proposal is intended to replace an existing tower and that, without a replacement facility, a coverage gap may result. Nevertheless, the Examiner was tasked with determining whether a specifically proposed 80-foot tall tower in Fairweather Nature Preserve meets the criteria of Ch. 20.37 MMC; not whether any site at all is necessary for T-Mobile's future coverage needs. The Hearing Examiner's decision does not preclude the possibility that other WCF proposals in the area might meet the criteria of Chapter 20.37 MMC.

### *2. Height of the Temporary WCF*

The Applicant argues that the Hearing Examiner made a "material error" in describing the height of the temporary WCF in Fairweather Nature Preserve as 35 feet because, as "emphasized by the Examiner, 'MMC 20.37.070.3 . . . dictates that a structure taller than 35' may only be approved

when a significant coverage gap is shown.”<sup>6</sup> *Memorandum in Support of Motion for Reconsideration, page 6 (quoting August 21 Decision, page 23)*. Although this fact is immaterial to the Hearing Examiner’s decision, it should be noted that no evidence in the record establishes at what height on the pole T-Mobile’s equipment is mounted.<sup>7</sup> Further, contrary to the Applicant’s assertion, a temporary WCF may be permitted at a 45-foot height (MMC 20.35.040<sup>8</sup>). MMC 20.37.070.3 is inapplicable to discussion of the temporary tower. *Exhibit 36*.

The Applicant opines that the “Examiner’s conclusion that there is no significant gap [in coverage] pivots on his erroneous belief that current T-Mobile coverage with the temporary facility relies on 35’ of height.” *Memorandum in Support of Motion for Reconsideration, page 6*. To clarify, the evidence establishes that a temporary WCF height of 45 feet appears adequate to address coverage needs in the area. Contrary to the Applicant’s assertions, the fact that the temporary facility in Fairweather Nature Preserve is 45-feet tall rather than 35-feet tall is immaterial. The Applicant requested an 80-foot tower and failed to establish that this tower height (whether 45 feet or 35 feet taller than the temporary structure in the Park) is the minimum necessary to avoid a significant gap in service coverage on the SR-520 bridge.

### 3. Proposed Tower Height

The Applicant next argues that the Hearing Examiner failed to consider or understand the evidence it presented concerning the proposed WCF height of 80 feet. The Applicant stresses that T-Mobile’s RF engineer discussed the need for a taller WCF because tree heights in the area have grown since the original tower was permitted in 2002. The Applicant also argues that the Hearing Examiner failed to consider coverage maps prepared by T-Mobile that show a coverage gap would exist without a WCF in the area.

Contrary to the Applicant’s assertions, T-Mobile’s RF engineer’s analysis is discussed in Finding 12 of the decision: the decision explicitly notes that T-Mobile opines that tree canopy growth has had a detrimental impact on coverage and a taller tower is needed in result. The decision also explicitly addresses Exhibit 16 (in Finding 22) and notes that the exhibit fails to provide any analysis related to coverage on the SR-520 bridge. *Exhibit 5; Exhibit 16; Memorandum in Support of Motion for Reconsideration, page 6; August 21 Decision, pages 11 and 13*.

The Applicant argues that there is a significant gap in coverage that would be filled by the proposed WCF and that this “gap exists even with the current 45’ tall temporary facility, and will be exponentially exacerbated if the Evergreen Bridge site is eliminated by the Hearing

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<sup>6</sup> The evidence establishes that the height of the temporary WCF’s wooden pole is 45 feet; not 35 feet as stated in the original decision. The final decision is hereby amended to correct this error of fact.

<sup>7</sup> In fact, site plans show that T-Mobile’s equipment was planned, at one time, to be mounted on the temporary site at a centerline of 31 feet. *Exhibit 63(c)*.

<sup>8</sup> At the time the temporary site was first permitted, it fell under former MMC 17.56B.035, as reflected in Exhibit 36. Although recodified at Chapter 20.37 MMC, the current Medina Wireless Code retains the allowable height distinctions between temporary and permanent WCFs.

Examiner's August 25, 2014 permit denial." *Memorandum in Support of Motion for Reconsideration, page 8 and 9.* The Hearing Examiner acknowledges that, without a WCF in the area, a coverage gap may occur. However, the Examiner is not tasked with determining whether *any* particular WCF is necessary but whether a WCF 80-feet tall is necessary to avoid a significant coverage gap. As the decision states:

The Applicant has failed to present evidence. . . that other types of facilities or other locations were even considered. This failure to explore and/or document alternative sites is another reason for denying the SUP request. The Code does not merely require an Applicant to successfully lease property from the City and then seek SUP approval. Instead, it mandates that the Applicant demonstrate the need for an SUP after exploring options involving other facilities, other locations, and even locations outside of the city limits.

*August 21 Decision, page 23; see also Findings 35 and 37 (the City and Applicant only considered sites on City-owned property).*

The Applicant also argues that the Hearing Examiner's decision "erroneously concludes that the record does not support the existence of a significant gap that extends onto the 520 bridge nor a need for the 80' pole height." *Memorandum in Support of Motion for Reconsideration, page 10.* The Applicant states that the Hearing Examiner did not grant enough weight to Exhibits 5, 16, and 45 and that, if the Hearing Examiner more closely scrutinized this evidence, he would agree that an 80-foot tower is necessary to provide continuous coverage on the SR-520 bridge.

Contrary to the Applicant's assertions, the initial decision explicitly addresses Exhibits 5, 16, and 45 and a number of other findings. For instance, Finding 22 notes that Exhibit 16 does not address the SR-520 bridge at all and Finding 27 notes that T-Mobile's own expert (Jeff Adams, P.E., who prepared Exhibit 45) did not specifically address whether coverage gaps exist on the bridge but only whether a higher tower would improve coverage in Medina. In fact, Exhibit 45 clearly shows coverage on the SR-520 bridge from a number of tower heights other than 80 feet. *Hearing Examiner July 16, 2014, Decision, pages 13 and 15; Exhibit 16; Exhibit 45.*

#### *4. Radiofrequency Interference*

The Applicant last argues that the Hearing Examiner erred in concluding that it omitted required information on radiofrequency (RF) interference. The Applicant states it did not provide this information because federal law preempts consideration of RF interference by local government. Although the Applicant has presented a number of federal cases discussing RF interference and preemption, the Hearing Examiner notes that the decision was not focused on potential RF interference, but on the fact that the Medina Municipal Code requires documentation of non-interference as a criterion that must be considered. The Applicant presented no evidence addressing this criterion. *Memorandum in Support of Motion for Reconsideration, page 13.*

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The Hearing Examiner lacks jurisdiction to determine the validity of MMC 20.37.130.H. It is undisputed that the Applicant failed to present any analysis on potential RF interference as required by the Code. The Hearing Examiner does note in his decision that the Applicant's failure to establish the need for an 80-foot tower was the primary basis for the denial of the permit, and that the RF interference issue was only a minor consideration.

*Conclusion*

The Applicant's request for reconsideration fails to meet the criteria of MMC 2.78.090. It is undisputed that the Applicant has not substantially modified its proposal or that newly discovered, material evidence impacts the decision. The Applicant appears to argue that the Hearing Examiner's mistake on the height of the temporary WCF in Fairweather Nature Preserve was an "irregularity" that denied it a fair hearing. This argument is unpersuasive. The height of the temporary WCF is irrelevant to the decision. The Applicant had the burden of establishing that the tower height it requested, 80 feet, was the minimum height necessary to avoid a service gap on the SR-520 bridge. The Applicant did not carry this burden.

The Applicant also argues the Hearing Examiner committed legal error in accounting for RF interference in his decision. While MMC 20.37.130.H requires the Applicant to submit information about potential RF interference, the Hearing Examiner lacks jurisdiction to determine how Radio Frequency might impact the requested permit. The Applicant's failure to submit this information was only a minor consideration in the Examiner's decision and did not impact the final decision. Accordingly, the Applicant's Motion for Request for Reconsideration must be **DENIED**.

So ordered this 10<sup>th</sup> day of October 2014.

  
THEODORE PAUL HUNTER  
Hearing Examiner  
Sound Law Center