

PL-13-031; PL-13-032

AUG 25 2014

CITY OF MEDINA

**BEFORE THE HEARING EXAMINER
FOR THE 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)
)
For a Special Use Permit and Variances)

**FINDINGS, CONCLUSIONS,
AND DECISIONS**

SUMMARY OF DECISION

The request for a non-administrative special use permit, and variances from Medina Municipal Code 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 at Fairweather Nature Preserve is **DENIED**. The Applicant has failed to provide sufficient evidence establishing that an 80-foot monopole is necessary to avoid a significant service gap along the SR-520 floating bridge, that the requested facilities are the least intrusive in the residential setting of the community, and that the proposal will not cause interference with other wireless communication facilities and telecommunication devices in the area.

SUMMARY OF RECORD

Hearing Date:

The City of Medina Hearing Examiner held an open record hearing on the request on July 16, 2014. At the hearing, the Hearing Examiner granted a request of the Applicant to respond in writing to public comments at the hearing. The record was kept open for this response until July 28, 2014. The record was kept open for any response to the Applicant's submittal until August 11, 2014.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

- Jenny Ngo, City Planning Consultant
- Robert Grumbach, City Development Services Director
- Jeff Adams, P.E., SpectraNet, for Applicant
- Dan Schweigard, Applicant Representative
- Cynthia Adkins
- John DeFeo, P.E.
- John Harris
- Dinny Hansen
- David Langworthy

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Eric Oeltjen
Sarah Bailey
Jenny Duncan
Bhavnish Lathia
Roger Frey
Sheree Wen
David Yee
Myrle Bossart
Steven Yee
Heija Nunn
Patrick Boyd

Attorney Richard Stephens represented the Applicant at the hearing
Attorney Ian Morrison represented a group of Medina residents at the hearing

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated July 8, 2014
2. Special Use Permit Application, received September 25, 2013
3. Variance Application Checklist, received September 25, 2013
4. *Special Use Permit and Area Variance Consolidated Application* report, prepared by Daniel Schweigard, Independent Towers Holdings, LLC, dated August 19, 2013
5. Letter from Darryl Salk, T-Mobile USA, to City Planner, dated June 23, 2014
6. Letter from Daniel Schweigard, Independent Towers Holdings, LLC, to City of Medina, dated August 6, 2013
7. Project Drawing Plans, dated June 24, 2014
 - a. Title Sheet (Sheet T1)
 - b. General Notes & Legend (Sheet C1)
 - c. 500' Abutters Layout (Sheet C2)
 - d. Overall Site Layout (Sheet C3)
 - e. Enlarged Site Layout (Sheet C4)
 - f. East Elevation View (Sheet C5)
 - g. North & South Elevation View (Sheet C6)
 - h. Utility Rack Details (Sheet C7)
 - i. T-Mobile Antenna Details (Sheet C8)
 - j. Verizon Wireless Antenna Details (Sheet C8A)
 - k. Details (Sheet C9)
 - l. Details (Sheet C10)
 - m. Sound Attenuation Wall Detail (Sheet C11)
 - n. Chain Link Safety Fence Details (Sheet C12)
 - o. Structural Details – Roof Plan (Sheet C13)
 - p. Structural Details – Floor Plan (Sheet C14)

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- q. Structural Details – Foundation Plan (Sheet C15)
 - r. Structural Details – Building Section (Sheet C16)
 - s. HVAC Unit Detail (Sheet C17)
 - t. Electrical/Telco Layout (Sheet E1)
 - u. Grounding Layout (Sheet E2)
 - v. Electrical /Telco Notes (Sheet E3)
 - w. Grounding Details (Sheet E4)
 - x. Antenna Grounding Details (Sheet E5)
 - y. Grading, Drainage, Erosion Control Plan (Sheet EC1)
 - z. Grading, Drainage, Erosion Control, Notes & Details (Sheet EC2)
8. SEPA Checklist (File No. PL-13-033), dated July 1, 2014
 9. SEPA Determination of Nonsignificance, dated July 1, 2014
 10. FCC Radio Station Authorization, granted November 29, 2006
 11. Declaration of Agency, dated February 3, 2014
 12. Lease Agreement between the City of Medina and Independent Towers Holding Corporation, executed December 8, 2011
 13. Consent to Sublease – Co-location (T-Mobile) agreement between the City of Medina and Independent Towers Holding, executed November 13, 2012
 14. Communication Site Sublease between Independent Towers Holding Corporation and T-Mobile, executed March 6, 2013
 15. View-shed analysis prepared by T-Mobile, 7 photos, undated
 16. T-Mobile Coverage Maps (2), undated
 17. Email from Darryl Salk, T-Mobile, to Daniel Schweigard of Independent Towers Holdings, LLC, dated June 11, 2014
 18. Letter from Alan Burt, P.E., SSA Acoustics, LLP, to Daniel Schweigard, RE: Acoustical Report, dated April 21, 2014
 19. National Environmental Policy Act (NEPA) Screening Report, Infinigy Engineering, PLLC, dated August 10, 2012
 20. Non-ionizing Electromagnetic Exposure Analysis and Engineering Certification, prepared by B.J. Thomas, P.E., dated August 13, 2013
 21. Non-ionizing Electromagnetic Exposure Analysis and Engineering Certification, prepared by B.J. Thomas, P.E., dated April 21, 2014
 22. “Re: Engineering opinion of recent submissions regarding the ‘MEDINA FAIRWEATHER PARK’ facility,” prepared by David Pinion of Hatfield & Dawson Consulting Electrical Engineers, dated June 14, 2014
 23. Federal Communications Commission Fact Sheet, “New National Wireless Tower Siting Policies,” dated April 23, 1996
 24. Federal Communication Commission Office of Engineering and Technology “Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields,” edition 01-01
 25. Letter from Daniel Schweigard to Robert Grumbach, RE: Application for Special Use Permit and Area Variance, dated September 12, 2013

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26. Letter from Daniel Schweigard to Robert Grumbach, RE: Time Extension Request – Respond to Comments, dated January 10, 2014
27. Letter from Daniel Schweigard to City of Medina, RE: Response to Comments Dated – October 15, 2013, dated January 13, 2014
28. Email from Jenny Ngo to Daniel Schweigard, dated February 13, 2014
29. Letter from Daniel Schweigard to Robert Grumbach, RE: Supplemental Information, dated April 22, 2014
30. Email from Jenny Ngo to Daniel Schweigard, dated May 30, 2014, with email string
31. Letter from Richard M. Stephens to Robert Grumbach, RE: Independent Tower Holdings LLC's Application for a Variance and SUP (with attachments), dated June 25, 2014
32. Letter from Richard M. Stephens to Robert Grumbach, RE: Independent Tower Holdings LLC's Application for a Variance and SUP, dated July 8, 2014
33. Letter from Richard M. Stephens to Robert Grumbach, RE: Response to Request for Continuance of Hearing...and Request for Extension of the Deadline for Appealing the Threshold Determination, dated July 8, 2014
34. City Memorandum from Chris Bacha to Robert Grumbach, dated June 2, 2014
35. Staff Analysis and Decision, Temporary Use Permit No. TUP 276, dated March 29, 2012
36. Staff Analysis and Decision, Temporary Use Permit No. PL-12-026 TUP, dated October 26, 2012
37. Medina City Council Regular Meeting Agenda, dated June 13, 2011
 - a. Agenda Bill
 - b. Visual simulations prepared by Infinigy Engineering, (6 photos), undated
 - c. Resident mailing postcard
38. Letter from Richard M. Stephens to Robert Grumbach, RE: Information Requested on Independent Towers Holdings LLC's Application for a Variance and SUP, with attachments, dated July 8, 2014
39. Letter from D. Robert Ward, P.E., Geotech Consultants, Inc., to Independent Towers, RE: Slope Evaluation Letter, dated July 8, 2014
40. Letter from D. Robert Ward, P.E. Geotech Consultants, Inc., to Independent Towers, RE: Original Grade Determination, dated July 8, 2014
41. Letter from Jeff C. Adams, P.E., SpectraNet, to City Planner, RF Coverage Analysis, dated July 7, 2014
42. Legal Notices
 - a. Notice of Incomplete Application, dated October 18, 2013
 - b. Determination of Complete Application, dated April 21, 2014
 - c. Notice of Application; Declaration of Posting; Declaration of Mailing, with mailing labels; Declaration of Mailing to SEPA agencies (all dated April 29, 2014)
 - d. Notice of Hearing, undated; Declaration of Posting, dated June 30, 2014; Declaration of Mailing, dated July 1, 2014, with mailing labels; Affidavit of Publication and ad copy, dated July 1, 2014
43. Written public comments received
 - a. Email from Robert Grumbach to Jenny Ngo, dated May 5, 2014, with email string
 - b. Email from Roger Gulrajani to Jenny Ngo, dated May 4, 2014

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- c. Letter from Jennifer Garone to Jenny Ngo, dated May 7, 2014
- d. Letter from David Langworthy to Jenny Ngo, dated May 8, 2014
- e. Letter from David Langworthy to Jenny Ngo, dated May 12, 2014
- f. Letter from David Yee to Hearing Examiner, dated May 10, 2014
- g. Letter from James and Barbara Baker Quinn, dated May 12, 2014
- h. Letter from Gretchen Stengel to City of Medina, dated May 12, 2014
- i. Letter from Stephen Preston to City of Medina, dated May 12, 2014
- j. Letter from Laurel Preston, dated May 13, 2014
- k. Letter from Cynthia Adkins and John Harris to City of Medina, dated May 13, 2014, with email string
- l. Email from Robert Grumbach to Donna Goodman, dated May 14, 2014, with email string and letter from Sheree Wen to Michael Sauerwein, dated May 13, 2014
- m. Email from Robert Grumbach to Donna Goodman, dated May 14, 2014, with email from Betsy Johnson to Donna Goodman, dated May 13, 2014
- n. Letter from Kanan and Bhavnish Lathia to Medina City Council, dated May 13, 2014
- o. Email from Robert Grumbach to Jenny Ngo, dated May 20, 2014, with email from Sarah and David Doud to the Medina Park Board, dated May 19, 2014
- p. Email from Kristin McKenna to Robert Grumbach, dated May 20, 2014, with email from Bhavnish and Kanan Lathia to the Medina Park Board, dated May 20, 2014
- q. Email from Robert Grumbach to Jenny Ngo, dated May 21, 2014, with email from Steve Preston to the Medina Park Board, dated May 20, 2014
- r. Letter from Cynthia Adkins and John Harris to City of Medina, dated May 23, 2014, with email string
- s. Letter from Cynthia Adkins and John Harris to City of Medina, dated May 29, 2014, with email string
- t. Letter from Cynthia Adkins and John Harris to City of Medina, dated May 30, 2014, with email string and three photos
- u. Email from Cynthia Adkins to Robert Grumbach, dated June 18, 2014, with email string
- v. Email from Robert Grumbach to Matt Rossmeissl, dated June 21, 2014, with email string
- w. Email from Robert Grumbach to Ron Santi, dated June 21, 2014, with email string
- x. Email from Robert Grumbach to Richard Fade, dated June 23, 2014, with email string
- y. Email from Robert Grumbach to Allison Frey, dated June 23, 2014, with email string
- z. Email from Robert Grumbach to Roger Frey, dated June 23, 2014, with email string
- aa. Email from Robert Grumbach to Jenny Ngo, dated June 23, 2014, with email from John Li, dated June 23, 2014
- bb. Email from Cynthia Adkins to Robert Grumbach, dated June 23, 2014, with email string
- cc. Email from Robert Grumbach to Ben Magnano, dated June 24, 2014
- dd. Email from Robert Grumbach to Kris Taylor, dated June 24, 2014, with email string
- ee. Email from Robert Grumbach to Lin Huang, dated June 24, 2014, with email string

- ff. Email From Cynthia Adkins to Robert Grumbach, dated June 24, 2014, with email string
- gg. Email from Cynthia Adkins to Robert Grumbach, dated June 24, 2014, with comment submitted by Roger Gulrajani
- hh. Letter from Ann Slater, dated June 23, 2014
- ii. Email from Mariette Patterson, undated
- jj. Email from Robert Grumbach to Cynthia Adkins, dated June 24, 2014, with comment submitted by Stephanie Wallach
- kk. Email from Robert Grumbach to Valerie Parrish, dated June 25, 2014, with email string
- ll. Email from Robert Grumbach to Wendy Mangone, dated June 28, 2014, with email string
- mm. Email from Robert Grumbach to Roy Noorda, dated June 27, 2014, with email string
- nn. Email from Robert Grumbach to Jody Oeltjen, dated June 27, 2014, with email string
- oo. Email from Robert Grumbach to Ed Oeltjen, dated June 27, 2014, with email string
- pp. Email from Robert Grumbach to Jenny Ngo, dated June 27, 2014, with comment submitted by Sarah & Eric Oeltjen
- qq. Email from Cynthia Adkins to Robert Grumbach, dated July 1, 2014, with comment submitted by Michael Ridgeway
- rr. Email from Roger Gulrajani to Jenny Ngo, dated July 1, 2014, with email string
- ss. Email from Robert Grumbach to Jeffery Seely, dated July 2, 2014, with email string
- tt. Email from Robert Grumbach to Cynthia Adkins, dated July 2, 2014, with email string
- uu. Email from Robert Grumbach to Laura Wood, dated July 3, 2014, with email string
- vv. Email from Robert Grumbach to Jean Manning, dated July 7, 2014, with email string
- ww. Email from Robert Grumbach to Jenny Ngo, dated July 7, 2014, with email string and letter from Drew Blazey to Hearing Examiner, dated July 5, 2014
- xx. Letter from Cynthia Adkins to Robert Grumbach, dated July 7, 2014, with email string and attachments
- yy. Letter from G. Richard Hill to Medina City Council, dated June 10, 2014
- zz. Email from Robert Grumbach to David Yee, dated July 9, 2014, with email string
- aaa. Email from Robert Grumbach to Jenny Ngo, dated July 9, 2014, with email comment from Janet Deaton, dated June 22, 2014
- bbb. Letter from Laurel Preston to City of Medina, dated July 9, 2014, with attachment
- 44. Two viewshed simulations showing alternatives from playfield, undated
- 45. Updated RF Coverage Analysis, by Jeff Adams, P.E., SpectraNet, dated July 15, 2014
- 46. County staff PowerPoint presentation (21 slides)
- 47. Email from Dana Kaefer to Robert Grumbach, dated July 11, 2014, with email string
- 48. Email from Imad Haque to City Council, dated July 11, 2014
- 49. Email from Robert Grumbach to Skip Voorhees, dated July 14, 2014, with email string
- 50. Email from Robert Grumbach to Stephanie Haque, dated July 14, 2014, with email string
- 51. Email from Robert Grumbach to Trent Dykes, dated July 14, 2014, with email string

52. Email from Robert Grumbach to Brent Duncan, dated July 14, 2014, with email string
53. Email from Robert Grumbach to Jessica Rossman, dated July 14, 2014, with email string
54. Email from Susan Hansen to ccmil@medina-wa.gov, dated July 13, 2014
55. Letter from James L. Quinn to Hearing Examiner, dated July 14, 2014
56. Email from Myrle Bossart to ccmil@medina-wa.gov, dated July 14, 2014
57. Email from Robert Grumbach to Newell Bossart, dated July 15, 2014, with email string
58. Email from Richard Rogers to ccmil@medina-wa.gov, dated July 15, 2014
59. Email from Robert Grumbach to Brad Smith, dated July 16, 2014, with email string
60. Medina Residents Hearing Brief, dated July 16, 2014
61. Written comments of Cynthia Adkins and John Harris, dated July 16, 2014, with 11 attachments
62. T-Mobile propagation map for Hunts Point, undated
63. Coverage information
 - a. T-Mobile coverage map of Medina, undated
 - b. T-Mobile coverage map of Seattle to Hunts Point, undated
 - c. Lease Exhibit – Medina Fairweather Park – temporary wooden pole elevation
 - d. T-Mobile coverage map from Hunts Point Application, undated
64. Proposed WCF map, undated
65.
 - a. 500' Abutters Layout (Sheet C2), revised October 30, 2013, with notes
 - b. Aerial photo of site, undated
66. T-Mobile webpage, coverage map of Medina, undated

Pleadings:

Adkins Request for Continuance of Hearing and Request for Continuance of SEPA Appeal
 Deadline, dated July 7, 2014 (Exhibit 43.xx)
 Applicant's Response to Request for Continuances, dated July 8, 2014 (Exhibit 33)
 Medina Residents Hearing Brief, dated July 16, 2014 (Exhibit 60)
 Applicant's Response to Public Comment, dated July 28, 2014

Hearing Examiner Order:

Response to Requests for Continuances, dated July 10, 2014, denying the requests

The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

Application and Notice

1. Daniel Schweigard, on behalf of Independent Towers Holdings, LLC (Applicant),¹ requests a non-administrative special use permit (SUP), and variances from Medina

¹ 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.*

Municipal Code (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 structure would be located at Fairweather Nature Preserve and Park.² *Exhibit 1, Staff Report, page 1; Exhibit 2; Exhibit 3; Exhibit 6; Exhibit 7.*

2. The City of Medina (City) determined the application was complete on April 21, 2014. On April 29, 2014, the City posted the Notice of Application, Special Use Permit, Variance, and SEPA at public notice locations and at two locations within 300 feet of the subject property; published notice in *The Seattle Times*; and mailed a notice of application to owners of property within 300 feet of the subject property and agencies with jurisdiction, including SEPA agencies. On June 30, 2014, the City posted Notice of Hearing & Determination of Nonsignificance at public notice locations and at two locations within 300 feet of the subject property. On July 1, 2014, the City mailed notice of the open record hearing to owners of property within 300 feet of the subject property and published notice in *The Seattle Times*. The City received 38 individual public comments on the application and the proposed SEPA threshold determination. *Exhibit 1, Staff Report, pages 8-13; Exhibit 42.a. – d; Exhibit 43.*

State Environmental Policy Act

3. The City acted as lead agency and analyzed the environmental impacts of the proposal as required by the State Environmental Policy Act (SEPA), Chapter 43.21C RCW. City staff reviewed the Applicant's environmental checklist and other information on file with the City and determined that the proposal would not have a probable significant adverse impact on the environment. The City issued a Determination of Nonsignificance (DNS) on July 1, 2014. The City consolidated the DNS and application comment periods pursuant to the Optional DNS process provided by Washington Administrative Code (WAC) 197-11-355. The DNS was not appealed. *Exhibit 1, Staff Report, page 3; Exhibit 8; Exhibit 9; Exhibit 42.c.*

Comprehensive Plan, Zoning, and Surrounding Uses

4. The subject property is designated "Parks" by the City Comprehensive Plan. According to the City Comprehensive Plan, most of the non-residential land uses that exist in the city have been in place since before, or around the time of, incorporation and have become an accepted and integral part of the community. These non-residential uses are subject to the special-use provisions of the City code. *Exhibit 1, Staff Report, pages 3 and 6.*
5. Comprehensive Plan Land Use Element goals relevant to the proposal include: maintaining a high-quality residential setting and character, and maintaining, preserving, and enhancing the functional and historic contributions of public facilities and amenities.

² The property is identified by Tax Assessor's Parcel No. 2425049088. A legal description of the subject property is provided in the staff report. *Exhibit 1, Staff Report, pages 1 to 3; Exhibit 3.*

Community Design Element goals include maintaining an informal, natural appearance of public areas. Parks and Open Space Element goals include maintaining and enhancing Medina's parks and open spaces to meet the city's needs, and identify annual revenue and special funding sources to maintain and improve parks and open spaces. Specific to Fairweather Nature Preserve, the Comprehensive Plan states that the "City should retain the Fairweather Nature Preserve in its natural state and provide maintenance only when necessary."³ Utility Element goals include maintaining utility services, minimizing aesthetic and environmental impacts, and undergrounding all remaining overhead utilities.⁴ The Comprehensive Plan also recognizes that, technological advancement in telecommunications is proceeding swiftly and "the trend appears to be towards physically smaller individual transmission/receiving facilities."⁵ *Exhibit 1, Staff Report, pages 6 and 7.*

6. The subject property is in the City's Parks and Public Places zoning district. MMC 20.37.050.C. and MMC 20.37.060 provide that wireless communications facilities (WCFs) are allowed within the Public Parks and Places zoning district on certain qualifying properties that contain a non-residential land use, as identified in the land use inventory set forth in the City Comprehensive Plan. MMC 20.37.060.A.1 prohibits WCFs in all portions of city parks except those portions of Fairweather Nature Preserve that are non-forested and adjacent to state highway right-of-way. SR-520 is located to the south and west. Residential uses to the north are in the City's R-20 zone, and property to the east is residential within the Town of Hunts Point. *Exhibit 1, Staff Report, pages 3 and 6.*

Property Description

7. The proposed WCF would be within Fairweather Nature Preserve near the northeast intersection of Evergreen Point Road and SR-520. Fairweather Nature Preserve is approximately 10 acres directly north of SR-520 and bounded by Evergreen Point Road to the west, N.E. 32nd Street to the north, and 80th Avenue N. to the east. The western two acres serve as an active-use area with a small playfield, two tennis courts, a tennis practice backboard, basketball hoop, and parking facilities. A row of mature trees extends along the western edge. The area to the east is a forest, which includes a stream and walking trails. *Exhibit 1, Staff Report, page 14; Exhibit 7.*

³ *City of Medina: Comprehensive Plan, Policy PO-P6, page 50.*

⁴ City staff identified Comprehensive Plan Land Use Element Goals LU-G1, LU-G2, and Policies LU-P5 and P9; Community Design Element Goal CD-G2; Parks and Open Space Element Goals PO-G1 and PO-G3, and Policy P6; and Utility Element Goals UT-G1, UT-G2, and UT-G3, and Policies LU-P1. *Exhibit 1, Staff Report, pages 6 and 7.*

⁵ *City of Medina: Comprehensive Plan, Utilities Element, page 61.*

The Proposal

8. The Applicant proposes constructing a WCF, with nine panel antennas, on the interior of an 80-foot monopole structure in the southeast portion of Fairweather Nature Preserve. The WCF would include a 61-foot by 25-foot (1,525 square foot) equipment housing structure approximately 10 feet tall and at-grade with the neighboring playfield. The roof would be planted with grass, connecting to the existing playfield. An eight-foot fence would be located on the east side of the equipment structure, with landscaping on the north and south sides. The City of Medina City Council approved a lease with Independent Towers Holding, Inc., on March 14, 2011, to rent 5,600 square feet for a WCF. The validity of the lease is contingent on Independent Tower's "ability to obtain, maintain, renew and reinstate all the certificates, permits, licenses, zoning, variances and other approvals which may be required."⁶ *Exhibit 1, Staff Report, page 14; Exhibit 12.*
9. SSA Acoustics provided an Acoustical Report for the Applicant dated April 21, 2014. The City adopted the King County Code (KCC) Chapter 12.88 noise standards which are 55 dBA during daytime hours and 10 decibels less during nighttime hours (10:00 PM and 7:00 AM on weekdays, and 10:00 PM and 9:00 AM on weekends). The proposed equipment includes split-system air conditioning units, which would run 24 hours a day. The Applicant proposes to install a sound attenuation wall along the east side of the building. The Acoustical Report determined that the equipment noise level would meet the 45 dBA nighttime noise limit at the north property line and would be below the average ambient levels at the tennis court, 10 feet east of the proposed equipment building. *Exhibit 1, Staff Report, page 26; Exhibit 18.*

Special Use Permit

10. The approval criteria for a non-administrative special use permit 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. Specifically, the use regulations include, among other requirements: (a). A maximum height of 35 feet for WCF structures, unless specified criteria are met allowing a height of 80 feet; (b). A setback for WCF structures of at least 500 feet from residential structures; (c). A requirement that WCF support structures be concealed underground; (d). A requirement to allow for co-location with other providers; (e). Documentation showing that new facilities would not interfere with other WCF structures in the area; (f). A showing that there is a demonstrated need for the facility; and (g). That the facility is the least intrusive necessary to meet that need. *MMC 20.37.070.B; MMC 20.37.100; MMC 20.37.110; MMC 20.37.130.H; MMC 20.37.140.*

⁶ *Exhibit 12, page 5.*

Height

11. Although the maximum height for a WCF structure outside a city right-of-way is normally 35 feet (MMC 20.37.070.B.2), a WCF antenna may be attached to a monopole support structure as tall as 80 feet, without a variance, when specific criteria are met. These criteria require the structure be located in the unforested section of Fairweather Nature Preserve adjacent to the SR-520 right-of-way; that the height is the minimum necessary to avoid a significant gap in service on the SR-520 floating bridge; that the height increase supports future co-location; and that all other applicable provisions of Chapter 20.37 MMC are followed. *MMC 20.37.070.B.3.*
12. On June 23, 2014, T-Mobile submitted a letter to the City stating that the proposed WCF “site is required to provide continuous coverage along SR-520 (the freeway as well as the floating bridge).” The letter also noted that “the tree canopy in the residential areas on both the north and south of SR-520 has grown (significant change) which has had a negative impact on the coverage from the cellular sites” and that the “height of the proposed pole addresses this obstacle to coverage.” *Exhibit 5.*
13. At the open record hearing on July 15, 2014, the Applicant submitted a PowerPoint presentation, prepared by Mr. Jeff Adams, P.E., SpectraNet, detailing the effects of various heights for the proposed monopole on coverage in the Medina area. The presentation indicates that a taller monopole would generally provide better coverage in the area. *Exhibit 45.*
14. A number of public comments submitted prior to the open record hearing expressed concern over the proposed height of the structure. Specifically, Ms. Sheree Wen, Seattle Chair of the Institute of Electrical and Electronic Engineers, expressed concern over the potential for large-scale monopoles like the one proposed to quickly become obsolete with recent advances in telecommunications technology, and Mr. David Yee observed that the Applicant failed to substantiate its claims that a significant gap in service coverage presently exists or that an 80-foot monopole (as opposed to a monopole of any other height) is necessary to provide coverage on the SR-520 floating bridge. At the hearing, Mr. Yee also submitted an exhibit (Exhibit 63) consisting of recent screen shots of T-Mobile’s website showing coverage in the area, and along the SR-520 bridge, as “Excellent.” *Exhibit 43.l; Exhibit 43.z; Exhibit 63.*
15. A group of Medina residents, represented by Attorney Ian Morrison, submitted a brief at the hearing reiterating Ms. Wen and Mr. Yee’s concerns about the structure height and arguing that the proposed structure is not “adjacent to” the SR-520 right-of-way. The brief states that the proposed WCF structure would be no less than 28 feet from the right-of-way and that the adjacency requirement should be read to require the lease site to abut or be contiguous to the right-of-way. The Applicant responded to this argument in a brief of its own, noting that “adjacent” is not always defined as “contiguous” and that Black’s

Law Dictionary defines adjacent as “lying near or close to; sometimes, contiguous.” The Applicant also argued that “[g]iven that the City chose to lease this site specifically for a pole in Fairweather, it is reasonable to assume that it was interpreting its own code term ‘adjacent’ in this context as ‘near or close to.’” *Exhibit 60; Applicant’s Response to Public Comment, page 5.*

Setback from Residential Property

16. MMC 20.37.070.B.4 requires all WCF structures, except for security barriers, to be set back a distance of at least 500 feet from the property line of all residential properties. The Applicant seeks a variance from this requirement, as the proposed facility would be approximately 170 feet from residential property lines. In seeking the variance, the Applicant argues that there are no locations in the unforested portion of Fairweather Nature Preserve that meet the 500-foot setback requirement. The Applicant also argues that the City chose to lease the property to it and that Independent Towers does not currently have rights to another leased area that would meet these criteria. *Exhibit 31; Applicant’s Response to Public Comment, page 18.*
17. A number of public comments submitted prior to the open record hearing expressed concern over the intrusion of the WCF into the 500-foot setback. Specifically, Mr. Stephen Preston expressed concern that the “proposed location would be highly visible from several residential properties, visitors in Fairweather Park, and would clash with the semi-rural character of Medina.” Ms. Jody Oeltjen expressed concern about the “adverse impact the complex would have on the character of the neighborhood and on the value of the 23 houses within 500 feet of the facility.” *Exhibit 43.i; Exhibit 43.nn.*

Undergrounding Requirements

18. MMC 20.37.100 requires all WCF equipment housing structures to be concealed underground. The Applicant seeks a variance from this requirement, as up to 10 feet of the proposed equipment housing structure will be located above ground. The Applicant argues that its proposal to leave part of the structure above ground was designed to “avoid interference with the park and play area” because to “underground entirely would impinge on the play area unnecessarily” based on the topography of the proposed site. *Exhibit 31.*
19. A number of public comments submitted prior to the open record hearing expressed concern about the lack of underground concealment of WCF support structures. For example, Ms. Cynthia Adkins and Mr. John Harris expressed concern that this “request is clearly inconsistent with the code requirement for undergrounding such facilities... The proposed location is clearly visible from surrounding residences, and the location is in a public park, adjacent to a nature preserve. This situation would be the worst possible situation in which to grant a variance for concealment requirements.” *Exhibit 43.k.*

Co-location Requirements

20. The Applicant must cooperate with owners of existing communication facilities to co-locate additional antennas on existing support structures and demonstrate a good-faith effort to co-locate, to the extent commercially feasible. *MMC 20.37.110*. The Applicant identified three existing WCFs near the proposed location on the north end of Medina. The first, a WCF operated by AT&T Mobility mounted to a building at Bellevue Christian School, is approximately 930 feet to the southeast and presently offers no additional space for co-location. The second, a series of low signal power antennas with a distance range of about 1,000 feet, is located near the intersection of Evergreen Point Road and N.E. 28th Place. The Applicant determined that this location is limited in height and unable to provide the service coverage needed. The third, a 97-foot WCF located at Hunts Point City Hall is adjacent to State Route 520 and the 84th Avenue lid, approximately 2,900 feet from the proposed facility. The Hunts Point ground elevation is 15 meters compared to the Medina location of 38 meters. The Applicant already has co-located at the Hunts Point site, but maintains additional coverage is needed to the west. *Exhibit 5; Exhibit 15; Exhibit 17*.

Non-interference

21. To receive approval of a request, all WCF applicants must submit documentation “showing that the proposed facility will not cause interference with other wireless communication facilities and telecommunication devices” in the area. *MMC 20.37.130.H*. The Applicant argues in its response document that “it is highly unlikely that T-Mobile has not considered the potential interference or over coverage issue when it decided to sublease from Independent Towers or that it does not know how to deal with these issues.” The Applicant, however, did not submit any documentation related to this requirement. *Applicant’s Response to Public Comment, page 22*.

Needs Analysis

22. To receive approval, the Applicant must demonstrate a need for the WCF, that it has a binding agreement with one or more carriers who provide personal wireless service, and that the WCF design is the least intrusive on the residential setting of the community. *MMC 20.37.140*. The Applicant submitted two coverage analyses. Exhibit 16 is an undated coverage map depicting the northern area of Medina and SR-520 as receiving poor to no service coverage.⁷ Exhibit 45 is a PowerPoint presentation with RF coverage analysis prepared by SpectraNet, dated July 15, 2014, which determined that a 76-foot center-line antenna height at the proposed site would afford the best wireless coverage area and signal quality compared with lower heights. The Applicant has entered into an agreement with T-Mobile West, LLC, to lease space on the proposed WCF. *Exhibit 1, Staff Report, pages 14, 22 to 23; Exhibit 5, Exhibit 14; Exhibit 15; Exhibit 16; and Exhibit 41, page 28*.

⁷ Exhibit 16 does not provide analysis related to the SR-520 floating bridge.

23. A number of public comments submitted prior to the open record hearing expressed concern about whether the Applicant had adequately demonstrated need for the proposed WCF, and whether the WCF design is the least intrusive on the residential setting of the community. Ms. Oeltjen, for example, expressed concern that “Independent Towers has not demonstrated that T-Mobile or any other wireless carrier needs an additional antenna in this general vicinity in order to provide adequate wireless service. . . or that the proposed location and the proposed footprint and design are the least intrusive options, as required by law.” *Exhibit 43.nn*.

Radio Frequency Standards

24. B. J. Thomas, P.E., prepared a Non-Ionizing Electromagnetic Exposure Analysis & Engineering Certification for the Applicant, dated August 13, 2013. The analysis determined that the proposed antennas would comply with the maximum permissible exposure (MPE) allowed by the Federal Communication Commission. Mr. Thomas also prepared a second report on behalf of Verizon Wireless to evaluate future radiofrequency emissions at ground level if all antenna slots in the proposed WCF were filled with future carriers. Hatfield & Dawson Consulting Engineers provided a third-party review of the RF emissions reports for the City and determined that the proposed WCF would comply with RF exposure requirements. *Exhibit 1, Staff Report, page 23; Exhibit 20; Exhibit 21; Exhibit 22.*

Variances

25. The Applicant seeks approval of two variance requests. The Applicant seeks a variance from the requirement under MMC 20.37.070.B.4 for a 500-foot minimum setback from residential use properties and from the requirement under MMC 20.37.100.D.1 for WCF equipment housing structures to be concealed underground. The Applicant’s arguments related to these variances are summarized above (Findings 16 and 18). The City did not make a recommendation on the variances. *Exhibit 1, Staff Report, pages 16, 34, 35, and 38.*

Summary of Public Testimony

26. Attorney Richard Stephens introduced the proposal on behalf of the Applicant. He argued that City policy encourages co-location of WCF structures, that the proposed site in Fairweather Nature Preserve is the only place in the city to site an 80-foot monopole, and that the variances requested are for the minimum relief necessary to build the project. Mr. Stephens further argued that the project is designed to reduce impacts on the park, that the project footprint is necessary to allow for co-location of five different providers, and that the project will not materially impact the area because noise, light, and traffic impacts are negligible. Mr. Stephens opined that the project meets the criteria for a non-administrative special use permit and for variances related to undergrounding the WCF support structures and residential setbacks. *Argument of Mr. Stephens.*

27. Jeff Adams, P.E., SpectraNet, testified on behalf of the Applicant and more thoroughly explained the PowerPoint presentation detailed in Finding 13. He explained that the presentation, Exhibit 45, details potential radio frequency (RF) coverage in the area based on height differences for the proposed tower. Mr. Adams testified that an antenna placed at 76 feet provides 10 percent more area coverage and 1.4 times higher average data speeds than an antenna set at 36 feet.⁸ He explained that RF gets attenuated and dispersed by trees and that this particularly affects T-Mobile because of the band frequency at which T-Mobile broadcasts its signal. Accordingly, he stated that T-Mobile needs more cell sites than other carriers and needs to have its antennas placed higher than other carriers. Finally, Mr. Adams commented that he did not look at whether coverage in the area (including on the SR-520 bridge) was adequate, but only at the relationship between monopole height and potential coverage in Medina. *Testimony of Mr. Adams.*
28. John DeFeo, P.E., testified on behalf of a group of Medina residents opposed to the project. Mr. DeFeo was involved in engineering much of Medina's original cell phone network. He expressed concerns about the accuracy of Exhibit 45 because it fails to account for the impact of other WCF structures on coverage in the area, including sites in Hunts Point and at Clyde Hill. Mr. DeFeo explained that it is problematic to justify the need for another WCF structure without accounting for the affects and impacts of other facilities in the area. He explained that "over coverage" and interference can become a problem when coverage areas overlap and that, in his view, the Applicant did not perform adequate analysis of this issue.⁹ He also expressed concern that no analysis was done addressing the impacts of the new lid on SR-520 on coverage in that area. *Testimony of Mr. DeFeo.*
29. Sheree Wen, P.E., testified about concerns with technical aspects of the proposed project. Ms. Wen reiterated many of the concerns she addressed in her written comments (Exhibit 43.1). She stressed that cell phone carriers are moving away from large towers toward small structures placed in multiple locations and that this technology is already pervasive. She further noted that, in case of potential disasters, it is much safer to have dispersed cells rather than a single structure that, if damaged, could bring down the entire network. *Testimony of Ms. Wen.*
30. A number of Medina residents testified about their concerns that the proposed WCF structure is not the least intrusive option in the surrounding area.¹⁰ Specifically:

⁸Applicant Representative Dan Schweigard explained that 76 feet was used because mounting an antenna at 76 feet ensures that no portion of the antenna would rise above the 80 foot tower. *Testimony of Mr. Schweigard.*

⁹ Following Mr. DeFeo's testimony, Mr. Adams explained that he did not include potential interference issues in his analysis in Exhibit 45. *Testimony of Mr. Adams.*

¹⁰ The examples of Medina residents' concerns given in the following section are intended as illustrative to avoid duplicative summary of public testimony: most residents that testified expressed concerns about multiple aspects of the project.

- Cynthia Adams testified that she spoke with Washington State Department of Transportation (WSDOT) engineers who have identified places in the SR-520 right-of-way that would be appropriate to site a WCF structure. *Testimony of Ms. Adams.*
 - John Harris testified that it is hard to know what the alternatives are because, unlike in other recent WCF applications in the region, the Applicant in this instance did not look at alternatives. He noted that, in a recent WCF proposal in Anacortes, T-Mobile presented analysis on 18 alternative sites in its project proposal. *Testimony of Mr. Harris.*
 - David Langworthy testified that he believes the proposal will impact the playing field in the park and that, as a less intrusive alternative, the site should at least adjoin the SR-520 right-of-way. *Testimony of Mr. Langworthy.*
 - Roger Frey testified that he has consulted with experts in the communications field and that there is no justification for the proposal. *Testimony of Mr. Frey.*
31. Medina residents also testified that coverage in the area is already adequate. Specifically:
- Dinny Hansen testified that he recently visited T-Mobile’s own website and that it characterizes coverage in Medina as a whole, and for the drive over the SR-520 floating bridge, as “excellent.” *Testimony of Mr. Hansen.*
 - Stephen Yee testified that he accessed T-Mobile’s website on the morning of the hearing and discovered the same results as Mr. Hansen. *Testimony of Mr. Steven Yee.*
 - Heija Nunn testified that her own T-Mobile service is adequate, that she did not understand how a 10 percent improvement in coverage is “significant,” and expressed concern that the Applicant did not provide clear data on current coverage conditions that would justify the proposed project. *Testimony of Ms. Nunn.*
32. A number of Medina residents testified about their concerns with the aesthetic impacts of the project, including concerns over the impact on property values in the area and the use of Fairweather Nature Preserve for non-recreational uses. *See, e.g., Testimony of Mr. Eric Oeltjen; Testimony of Ms. Sarah Bailey; Testimony of Mr. Bhavnish Lathia; Testimony of Ms. Myrle Bossart.*
33. Other residents testified about concerns related to the proposed variances. For example, Jenny Duncan expressed concerns over the proximity of the site to local residences. David Yee testified that the design plans for the WCF support structure call for an exposed area that is approximately 9.5 feet tall by 60 feet wide, but that there does not appear to be any special circumstances that would preclude placing the entire support structure underground. *Testimony of Ms. Duncan; Testimony of Mr. David Yee.*
34. Medina resident Patrick Boyd testified in support of the project. He testified that he believes coverage is currently inadequate, that he supports the Applicant’s efforts at

providing potential co-location on the monopole, and that the location in Fairweather Nature Preserve is not problematic. *Testimony of Mr. Boyd.*

35. City Development Services Director Robert Grumbach testified about the project generally and addressed some of the public comments. He explained that the City views Fairweather Park and Fairweather Nature Preserve interchangeably and that they are a single entity for purposes of interpreting the City code. He testified that the word “adjacent” is not defined in the City code, but the word “adjoining” is defined as “touching” or “abutting” neighboring property, and that these words should retain distinct meanings. Accordingly, because the code states that any WCF structure in Fairweather Nature Preserve must be adjacent to the SR-520 right-of-way—rather than adjoining the right-of-way—structures near to (rather than abutting or contiguous to) the right-of-way satisfy the proximity element of MMC 20.37.060. Mr. Grumbach explained that the City Council approved the initial lease with Independent Towers before the final design of the SR-520 improvements were complete, and the lease location was selected based on the best information available at that time. He noted that the City considered other sites when contemplating the lease, but only those sites that already had WCF facilities. Mr. Grumbach also testified that, at the time of the lease, there were no other sites available that the City owned and/or controlled. *Testimony of Mr. Grumbach.*
36. Mr. Adams responded to technical concerns raised by public testimony. He testified that, in his view, the coverage maps from T-Mobile’s website were likely inaccurate and should be viewed as marketing materials. He agreed with Ms. Wen’s assessment that, in the future, the telecommunications industry will move toward a dispersed model of greater numbers of smaller WCF structures; however, he disagreed with Ms. Wen that the technology is already pervasive. *Testimony of Mr. Adams.*

Applicant Response to Public Testimony

37. The Hearing Examiner ruled, at the hearing, that the Applicant could respond in writing to issues of public concern raised at the hearing. The Applicant provided a detailed brief addressing these concerns. Specifically, the Applicant responded by arguing:
- Both the Comprehensive Plan and MMC 20.37.060 allow wireless facilities in Fairweather Nature Preserve so long as the WCF is in the nonforested part of the Park and is adjacent to the SR-520 right-of-way. It is undisputed the proposal is in the nonforested part of the Park and, given the “multiple potential interpretations of ‘adjacent,’ the Hearing Examiner should interpret it consistent with the way City staff (and the City Council in leasing the property) have done.” *Applicant’s Response to Public Comment, pages 5-6.*
 - The proposal complies with MMC 20.37.070.B because there will be a significant coverage gap on SR-520 without a WCF in the area. And, although “T-Mobile’s coverage analysis did not show [RF] propagation over the water . . . [Exhibit 45] shows substantially better coverage on [SR-520] over the water for an antenna height of 76 feet . . . compared with coverage

using an antenna height of 46 feet.” *Applicant’s Response to Public Comment, page 7*. In addition, T-Mobile’s coverage maps “may very well be prepared for marketing purposes” and lack accuracy. Finally, the Applicant noted that T-Mobile provided a letter (Exhibit 5) stating that the proposed monopole is needed to address coverage gaps in the area, including on the SR-520 bridge. *Applicant’s Response to Public Comment, pages 8-9*.

- The proposal complies with concealment requirements of MMC 20.37.100 because the monopole itself will be “painted in a nonreflective color to match the visual background,” and the support structure will be placed underground, “except on the east side facing the tennis courts and a small portion of the north and south sides, which will be concealed by a sound wall and vegetation.” *Applicant’s Response to Public Comment, pages 10-11*.
- The proposal complies with MMC 20.37.140 because the Applicant has demonstrated a need for the facility and the proposal is the least intrusive possible. The Applicant “worked with the City to design a pole that is simplistic as possible from the exterior, with all antenna concealed inside.” *Applicant’s Response to Public Comment, page 13*. In addition, while other sites may be available (such as in the WSDOT right-of-way), “the City will not allow a pole that exceeds 35 feet” at those locations. *Applicant’s Response to Public Comment, page 13*.
- Both variances should be granted. There are no other available sites that will accommodate an 80-foot structure and, accordingly, the 500-foot setback from residential property lines constitutes an unusual hardship. In addition, “[i]nstead of placing access routes, stairs and doors to the underground equipment storage, as well as air conditioning units on the top of the structure, which would interfere with use of the park for play, Independent Towers proposes to place [access above ground] on the east side to give the maximum use of the park for play purposes” so the variance related to undergrounding should be granted. *Applicant’s Response to Public Comment, page 18*.
- Over coverage or interference is not a concern because “cellular technologies like LTE can actually *use* overlapping coverage to provide better performance,” “carriers now have standard ways in which they mitigate interference,” and “it is highly unlikely that T-Mobile has not considered the potential interference or over coverage issues when it decided to sublease from Independent Towers [as] it would be contrary to its bottom line to enter into a lease arrangement” otherwise. *Applicant’s Response to Public Comment, page 22*.
- No definitive evidence was presented concerning aesthetic concerns or the impact of the proposed facilities on property values in the area. *Applicant’s Response to Public Comment, page 23*.

Staff Recommendation

38. City staff recommended that, with conditions, the non-administrative special use permit should be approved. Although City staff did not provide a recommendation on the proposed variances, the City staff did request the following conditions if the variances were approved: the variance from the minimum setback should be limited to that shown on Exhibit 7 (Sheet 3); the variance from the underground requirement should be limited to that shown in Exhibit 7; and the WCF should meet all other zoning requirements. *Exhibit 1, Staff Report, pages 38 and 39.*

CONCLUSIONS

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.*

Criteria for Review

Special Use Permit

The Hearing Examiner may approve a non-administrative SUP only if the following criteria are satisfied:

1. The use complies with the adopted goals and policies set forth in the comprehensive plan;
2. The use is designed to minimize detrimental effects on neighboring properties;
3. The use satisfies all requirements specified for the use;
4. The use complies with all applicable zoning and development standards and requirements; and
5. The use will have no materially detrimental effects on neighboring properties due to excessive noise, lighting, off-site traffic generation, or other interferences with the peaceful use and possession of said neighboring properties.

MMC 20.72.010.E.

A non-administrative special use permit is required for all wireless communication facilities in accord with the provisions of Chapter 20.72 MMC as well as the standards for a special use permit under Chapter 20.37 MMC described in detail in Findings 10-21. *MMC 20.37.120.*

Variance

Where unnecessary hardships and practical difficulties are created for the landowner in the application of the provisions of the zoning ordinances, the hearing examiner has authority to grant a variance in harmony with the general purpose and intent of the zoning ordinance, and

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such variances may vary any rules, regulations, or provisions of the zoning ordinances relating to the use of land or structures so that the spirit of the ordinances will be observed, public safety secured, and substantial justice done. *MMC 20.72.030.*

The Hearing Examiner may approve a non-administrative variance only if the following criteria are satisfied:

1. The variance does not constitute a granting of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and zone in which the subject property is located; and
2. The variance is necessary, because of special circumstances relating to the size, shape, topography, location or surroundings of the subject property, to provide it with use rights and privileges permitted to other properties in the vicinity and in the zone in which the subject property is located; and
3. The variance is necessary to relieve a material hardship that cannot be relieved by any other means such that the material hardship must relate to the land itself and not to problems personal to the applicant; and
4. The granting of such variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the subject property is situated; and
5. The variance is the minimum necessary to provide reasonable relief.

MMC 20.72.030.F.

In determining whether to approve a variance application, evidence of variances granted under similar circumstances shall not be considered. *MMC 20.72.030.E.2.*

In authorizing a variance, the Hearing Examiner may attach reasonable conditions to safeguard the public health, general welfare and safety. *MMC 20.72.030.G.*

The criteria for review adopted by the Medina City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

The Federal Telecommunications Act of 1996

In addition to considering the criteria and guidance in the Medina Municipal Code, the Hearing Examiner must be cognizant of federal statutes and court decisions that impact what authority a local government has over the siting of wireless communication facilities.

Federal law places certain limitations upon the power of local government to control the siting of personal wireless service facilities (wireless facilities). *47 U.S.C. 332(c)(7)(A).* Chief among those limitations is the preemption of control over radio-frequency emissions. *47 U.S.C.*

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332(c)(7)(B)(iv). As long as the wireless facility emits radio energy within the Federal Communications Commission's guidelines, local jurisdictions are forbidden from considering the environmental effects of such emissions in decisions about placement, construction, or modification of wireless facilities.

Other restrictions include a ban on any regulations that prohibit or have the effect of prohibiting the provision of personal wireless services. 47 U.S.C. 332(c)(7)(B)(i)(II). When applying a zoning code to a specific wireless facility site proposal, the local authority retains most of its original discretion. Both the visual impact of a wireless facility and the facility's departure from the area's general character can be legitimate reasons for denial of a siting permit. *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 727 (9th Cir. 2005). The standard for evaluating the denial of a particular antenna site adopted is the "least intrusive" standard. *MetroPCS*, 400 F.3d, at 735. Under the "least intrusive" standard, the Applicant bears the burden of showing that a particular site is the least intrusive site. See *APT Pittsburgh Ltd. Partnership v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469, 479-80 (3rd Cir. 1999). If the proposed site is the least intrusive and the denial of that location would effectively prevent an applicant from providing its service in the area, then the permit must be issued. *Cingular Wireless, Inc. v. Thurston County*, 425 F.Supp.2d 1193, 1195-6 (W.D. Wash. 2006; 47 U.S.C. 332(c)(7)(B)(iv).

Conclusions Based on Findings

The proposal does not satisfy all requirements specified for the use and does not comply with all applicable zoning and development standards and requirements. 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. Specifically, the use regulations require a maximum height of 35 feet (unless specified criteria are met allowing a height of 80 feet); a setback of at least 500 feet from residential structures; underground concealment of WCF support structures; allowance for co-location; documentation that the proposed facility would not interfere with other WCF structures in the area; evidence showing a demonstrated need for the facility; and that the facility is the least intrusive necessary to meet that need.

The Applicant failed to provide sufficient evidence, as required by MMC 20.37.130.H, showing that the proposed facility would not cause interference with other wireless communication facilities and telecommunication devices in the area.¹¹ The Applicant also failed to provide sufficient evidence establishing that the proposed 80-foot monopole structure is necessary to avoid a significant service gap on the SR-520 floating bridge: a prerequisite to approval of a structure taller than 35 feet under MMC 20.37.070.B.3.b. The Applicant admitted in its response to public comments that T-Mobile's own coverage analysis did not address whether a coverage gap existed on the SR-520 floating bridge and that Mr. Adams' analysis showed that coverage

¹¹ The Applicant did address this concern in its brief responding to public comments. However, legal argument by a non-expert in a responsive brief is insufficient to meet the documentation requirements of MMC 20.37.130.H.

would improve with an 80-foot structure, not that a service gap currently exists on the bridge. The only evidence provided by the Applicant regarding a potential service gap was a letter sent by T-Mobile stating that such a gap exists. Contrary to this assertion, however, T-Mobile's own website states that coverage on the bridge is excellent. The Applicant also failed to provide sufficient evidence establishing that the requested facilities are the least intrusive on the residential setting of the community. The record does not contain sufficient evidence to show that the Applicant sought alternative sites for its WCF structure. Finally, the Applicant did not provide sufficient evidence to show that an 80-foot pole is necessary, as compared to a pole of any other height, to maintain adequate coverage in Medina.

MMC 20.72.010.E dictates that each of its five listed criterion must be satisfied before the Hearing Examiner may approve a non-administrative special use permit. The Applicant failed to provide sufficient evidence satisfying the criteria that the proposal satisfies all requirements specified for the use and that the proposal complies with all applicable zoning and development standards and requirements. Accordingly, the Applicant's request for a special use permit must be denied. Because the Applicant's request for a special use permit must be denied, it is unnecessary to address the variances requested by the Applicant related to residential setbacks and undergrounding requirements. *Findings 1-38.*

DISCUSSION

It is clear from the testimony at the open record hearing that the overwhelming majority of Medina residents that took part in the hearing involved with siting a permanent, 80-foot monopole in Fairweather Nature Preserve and Park oppose the project. But “[c]ommunity displeasure cannot be the basis of a permit denial.” *Maranatha Mining v. Pierce County*, 59 Wn. App. 795, 804 (1990). Instead, a hearing examiner's land use decisions must be based on substantial evidence in the record. *See, e.g., Christianson v. Snohomish Health District*, 133 Wn.2d 647, 653 (1997). Here, the record establishes that the Applicant—who bears the burden of proof in land use decisions pursuant to Medina's Hearing Examiner Rules of Procedure § 1.7.9.A—failed to provide sufficient evidence establishing: (1) the necessity for an 80-foot monopole to avoid a significant service gap along the SR-520 floating bridge; (2) that the requested facilities are the least intrusive on the residential setting of the community; and (3) that the proposal will not cause interference with other wireless communication facilities and telecommunications device in the area.

MMC 20.37.070.B.3 clearly delineates when a WCF structure may be increased from 35 to 80 feet without a variance. The proposed structure must: (a) be located in the unforested section of Fairweather Nature Preserve and Park adjacent to the SR-520 right-of-way; (b) have the minimum height necessary to “avoid a significant gap in service on the SR-520 floating bridge”; (c) support future co-location; and (d) comply with all other applicable provisions of Chapter 20.37 MMC.

Although a number of residents argue that the proposed structure is not “adjacent” to the SR-520 right-of-way, the Hearing Examiner finds this argument unpersuasive. As a preliminary matter,

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Mr. Grumbach correctly observed that the City code does not define the term “adjacent” but does define the term “adjoining.” MMC 20.12.020.F defines the term “adjoining” to mean “property that touches or is directly across a street or private lane from the subject property.” Black’s Law Dictionary defines “adjacent” as “lying near or close to, but not necessarily touching.” *Black’s Law Dictionary (9th Edition)*. Here, while the proposed project is not contiguous or immediately abutting the SR-520 right-of-way, it is near or close to it. The proposed location is consistent with this section of the City code.

One primary reason denial is required by the City code is the Applicant’s failure to provide sufficient showing the necessity of an 80-foot height to avoid a significant gap in coverage on the SR-520 bridge. The only evidence in the record supporting the notion that a gap in coverage may exist is a brief reference to it in a letter provided by T-Mobile. No other schematic, scientific, documentary, or testimonial evidence supports the assertion. Mr. Adams’ RF analysis, for instance, focused almost exclusively on the benefits of placing an antenna at 76 feet, and not on whether an 80-foot monopole is necessary to rectify a service gap on the floating bridge. In addition, whether mere “marketing” materials or not, undisputed evidence in the record establishes that T-Mobile’s own website indicates that current coverage on the SR-520 bridge is excellent. The Applicant points out that current coverage schematics include the temporary 35-foot structure in place in Fairweather Nature Preserve, which, it argues, is evidentiary support for the notion that the proposed facility is necessary. This, though, is not what MMC 20.37.070.3 addresses. Instead, the provision dictates that a structure taller than 35 feet may only be approved when a significant coverage gap is shown. That present RF coverage maps and marketing materials indicate adequate coverage currently exists with a 35-foot tower only further supports the conclusion that an 80-foot tower is unwarranted. The Code does not seek to guarantee improved, ideal, or flawless coverage. Rather, it seeks to address the potential problem of a significant service gap on the SR-520 bridge. The Applicant has failed to establish that such a gap exists. Thus, the proposal cannot be approved.

The Applicant has also failed to establish that the “types and location chosen for the wireless communication facility... are the least intrusive upon the surrounding area.” MMC 20.37.140.C.4. The Applicant has repeatedly asserted that Fairweather Nature Preserve is the only location in Medina suitable for an 80-foot monopole. The Applicant has failed to present evidence, however, 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. MMC 20.37.140.C.3.

Finally, the Applicant failed to provide documentation, as required by MMC 20.37.130.H, showing that the proposed facility will not cause interference with other wireless communication facilities and telecommunications devices. Mr. DeFeo expressed this concern in the open record hearing, and Mr. Adams indicated that his own RF analysis did not account for this possibility.


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Although a potentially minor issue, MMC 20.72.010.E clearly dictates that the Hearing Examiner may only grant a non-administrative special use permit when the project satisfies all code requirements. Here, the lack of documentation concerning interference is another reason the SUP request must be denied.

DECISION

Based on the preceding Findings and Conclusions, the requests for a non-administrative special use permit, and variances from Medina Municipal Code 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 at Fairweather Nature Preserve is **DENIED**.

Decided this 21st day of August 2014.


THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center