

**FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE**

In the Matter of the Appeal of

JAMES BORROW, et al.,

from a decision of the Director,
Department of Planning and Development
Regarding a master use permit

Hearing Examiner file:
MUP-08-022(W,CU)

Department Project:
3006268

Introduction

The Director issued a SEPA decision and granted administrative conditional use approval to allow expansion of a minor communication utility, and the Appellants timely appealed. The hearing was held on October 28, 2008, before the undersigned Deputy Hearing Examiner (Examiner). The record was held open for the Examiner's site visit. Parties represented at the proceeding were: the Appellants, James Borrow et al., by James Borrow, pro se; the Director, Department of Planning and Development, by Gerald Suder, Senior Land Use Planner; and the applicant, Verizon Wireless, by Charles Maduell, attorney at law.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (SMC or Code) unless otherwise indicated.

After due consideration of the evidence elicited during the hearing, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The subject property is addressed as 6609 SW Admiral Way, in the Alki neighborhood. The property is zoned Single Family 5000 (SF 5000) and is developed with a multifamily structure, the Soundcrest Apartments. The applicant currently has three roof-mounted panel antennas located on top of the Soundcrest Apartments.

2. East of the site is a large public playfield, while to the west and north across Admiral, are single family homes. The area further north and to the east is also characterized by single family development. Homes in the vicinity are generally oriented west to capture views of the water, but nearby homes also obtain views of the building.

3. The zoning in the vicinity is shown in Exhibit 2. The zoning immediately surrounding the site is SF 5000. Zoning further to the north and west (generally along Alki Avenue) is Lowrise Duplex Triplex (LDT) and Multifamily Lowrise 2 (L2).
4. The topography of the area is generally depicted in Exhibit 29. The site slopes generally downward to the east.
5. The Soundcrest Apartments, which is an established nonconforming use in the zone, is 188 feet long and 47 feet wide. The height of the building is described in the Director's Report as both 28 feet (page 1) and 20 feet (page 4). However, the scaled drawings and the SEPA checklist show the building to be approximately 20 feet and five inches (to the top of the building roofline). There are currently three antennas on the east end of the building's roof, ranging from four to eight feet high.
6. The applicant proposes to install eight new panel antennas on the rooftop, and to screen both the new and the existing antennas. The three existing antennas would remain, for a total of 11 antennas on the rooftop. Two equipment cabinets would be installed at ground level along the east façade of the building.
7. The antennas would be located approximately 12 feet south of the north wall, 6 feet 6 inches west of the east wall and 20 feet east of the west wall of the building. The antennas would extend approximately 10 feet 5 inches above the rooftop of the structure, at a height of approximately 30 feet and five inches above grade. The screening wall would be 16 feet and eight inches by 16 feet 8 inches and 11 feet high. The screening would be painted to match the color of the Soundcrest Apartment building. The expected appearance of the facility from different vantage points is shown in Exhibits 32.
8. The proposal is intended to provide additional capacity and coverage. The existing coverage in the area is shown in Exhibit 35. The proposed coverage area, which expands north and west, is shown in Exhibit 36. The expanded area would serve boats in Puget Sound, among other users.
9. The proposal would meet the FCC limits for radiofrequency radiation.
10. DPD reviewed the application and issued a Determination of Nonsignificance and conditional use approval.
11. The appeal asserts that views from nearby homes will be affected by the project, and these impacts will not be mitigated by the proposal; the proposal exceeds the permitted height in the zone; the project increases the nonconformity of the existing building; the project will have a significant detrimental impact on the residential character of the surrounding area; the decision is not consistent with the Director's Rule (DR) 8-2004 concerning the "least intrusive location" and "least intrusive facility;" that the decision does not consider cumulative impacts that will result from this project and another application at the same site; inadequate mitigation is provided for noise impacts; and the property will adversely affect property values.

12. DR 8-2004 clarifies and interprets terms and criteria contained in SMC 23.57.010, including "least intrusive location" and "least intrusive facility." The Rule identifies an "order of preference" for location of minor communication utilities, with the most preferred location being industrial zones and the least preferred location being single family residential on non-arterial streets. The Director may allow deviation from this order if that would result in a less intrusive location than would otherwise be provided under strict adherence to the order of preference. Similarly, the Rule lists the order of preference for "least intrusive facility," ranging from a City Light transmission tower to a utility pole.

13. SMC 23.57.010.C.1 provides:

C. Uses Permitted by Administrative Conditional Use.

1. The following may be permitted by Administrative Conditional Use, pursuant to criteria listed in subsection C2, as applicable:

a. The establishment or expansion of a minor communication utility, except on lots zoned Single Family or Residential Small Lot and containing a single family residence or no use.

14. SMC 23.57.010.C.2 provides the criteria for an administrative conditional use:

a. The proposal shall not be significantly detrimental to the residential character of the surrounding residentially zoned area, and the facility and the location proposed shall be the least intrusive facility at the least intrusive location consistent with effectively providing service. In considering detrimental impacts and the degree of intrusiveness, the impacts considered shall include but not be limited to visual, noise, compatibility with uses allowed in the zone, traffic, and the displacement of residential dwelling units.

b. The visual impacts that are addressed in Section 23.57.016 shall be mitigated to the greatest extent practicable.

15. SMC 23.57.016.C provides that:

C. If mounted on a flat roof, screening shall extend to the top of communication facilities except that whip antennas may extend above the screen as long as mounting structures are screened. Screening for satellite dishes is addressed in subsection E, below. Said screening shall be integrated with architectural design, material, shape and color. Facilities in a separate screened enclosure shall be located near the center of the roof, if technically feasible. Facilities not in a separate screened enclosure shall be mounted flat against existing stair and elevator penthouses or mechanical equipment enclosures and shall be no taller than such structures.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 23.76.022. Under SMC 23.76.022, the Director's SEPA decision is given substantial weight, but no deference is given the Director's administrative conditional use decision.
2. The appeal asserts that the proposal is not the "least intrusive location" or "least intrusive facility" consistent with providing effective service. DPD argues that adherence to DR 8-2004's order of preferred locations or facility is not necessary here, because the site already has three antennas and is not a "new" facility. While the DPD decision does not specify the basis for this position, the argument is possibly based on SMC 23.57.009, which states that "new" minor communication utilities shall be regulated under SMC 23.57.010. But SMC 23.57.010.C.1.a. includes the "establishment or expansion" of a minor communication facility as a use that may be permitted by administrative conditional use. The proposal here, whether considered a new or expanded facility, is subject to the criteria of subsection C.2.a., including consideration of "least intrusive location" and "least intrusive facility."
3. The record lacks information to show whether or not this is the "least intrusive location" or the "least intrusive facility" consistent with SMC 23.57.010.C.2.a. The only location considered by the applicant and the Department was the rooftop of the Soundcrest Apartments, which is located in a single family zone. There is no information in the record to show whether or not there are other sites located in other zones, which under the DR 8-2004 would be considered less intrusive, consistent with the provision of effective service. Absent information about any other potential locations, it also cannot be determined whether the location is less intrusive than would be locations in other zones. Because the location has not been analyzed, it is not known whether other less intrusive facilities (e.g., rooftop of a nonresidential structure) are available. Without this information and analysis, the proposal does not satisfy the administrative conditional use criteria and the decision must be reversed.
4. As to visual impacts, assuming the location and type of facility were shown to meet SMC 23.57.010.C.2.a., the proposal would mitigate visual impacts to the greatest extent practicable as required by subsection C.2.b. Although the penthouse would be plainly visible, and would add to the perception of the building's height and bulk, the height of the antenna and the screening were shown to be necessary in order to clear the edge of the building and achieve effective coverage. Neighbors have made it clear that they do not wish to see this addition to the nonconforming building. But the penthouse does not exceed the allowable height for rooftop equipment on a building in the SF 5000 zone, nor was it shown to block public views or private views of the water. It will be painted to match the building and will have a rectangular shape that resembles the building overall.
5. Other issues raised in the appeal included noise impacts, but no evidence was presented to show that there would be noise impacts. Another appeal issue raised

concerns about other facility applications at this site. Certainly, the combined effects of other facilities should be given consideration (e.g., DPD in this case considered the fact that the proposal would result in the screening of the existing facilities). However, the record does not show that the decision in this case was in error on account of the existence of another application at this site.


6. The Appellants are also concerned about potential impacts to property values, but the Code does not specify that such impacts must be considered. Some of the Appellants' witnesses expressed concern about structural safety and impacts to health from radiofrequency radiation, but structural safety was not raised in the appeal, and in any event would be part of the building permit reviews. The Federal Telecommunications Act specifically preempts local government from regulating this proposal for possible effects of radiofrequency radiation on health.

7. No other errors were shown to have been made in the decision.

Decision

The Director's administrative conditional use decision is hereby **reversed**; the Director's SEPA decision is affirmed.

Entered this 13th day of November, 2008.



Anne Watanabe
Deputy Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. Any request for judicial review of the decision must be commenced within thirty (30) days of issuance of this decision in accordance with RCW 36.70C.040 and The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner.

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