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Skagit County Auditor

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AFTER RECORDING RETURN TO:
SKAGIT COUNTY HEARING EXAMINER
302 SOUTH FIRST STREET
MOUNT VERNON, WA 98273

DOCUMENT TITLE: ORDER DEFERRING MDNS APPEAL HEARING
AP 03 0181

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPELLANT: DAVID and GAYLE TJERSLAND, ET AL.

ASSESSOR PARCEL NO: P68632, P68629, P34762

LEGAL DESCRIPTION: The proposed project is located at 19299 Rexville Grange Road, Mount Vernon, WA; a portion of Government Lot 9; within the SE ¼ of the NE ¼ of Section 09, Township 33 North, Range 03 East, W.M., Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeal of)

AP 03-0181

DAVID AND GAYLE TJERSLAND,)
ET AL.)

ORDER DEFERRING
MDNS APPEAL HEARING

Regarding the Mitigated Determination)
Of Non-Significance (MDNS) Issued for)
The Application of T-Mobile to Erect a)
180-Foot Monopole Cell Tower Near the)
Rexville Grange Hall)

This appeal of a Mitigated Determination of Non-Significance (MDNS) came on regularly before the Hearing Examiner on April 23, 2003. John Meister, one of the appellants, appeared for the group of appellants. Marge Swint, Planner, represented the Planning and Permit Center. Steve Kaplan, Land Use Supervisor, appeared for the applicant T-Mobile.

At the outset, T-Mobile moved for a continuance on the basis that the MDNS appeal should be consolidated with consideration of the underlying permit application. T-Mobile asserted that consolidation is mandatory.

The Hearing Examiner granted the motion. This Order memorializes that ruling and provides the following explanation:

1. As of the date of hearing, the underlying decision on the application to erect a Cell Tower had not yet been made. The County is processing the underlying decision under Process I as an administrative decision. That decision, when made, will itself be appealable to the Hearing Examiner. See SCC 14.06.110(7).

2. If the appeal of the MDNS, also a Process I administrative decision, were heard separately, then there would be the possibility of two open record appeals on the same development project.

3. The MDNS is a procedural determination under the State Environmental Policy Act (SEPA) concerning whether or not an Environmental Impact Statement must be written. RCW 43.21C.075, the appeals section of SEPA, includes the following:

“Because a major purpose of this chapter is to combine environmental considerations with public decisions, any appeal brought under this chapter



shall be linked to a specific governmental action. . . .

Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations. . . .

“If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure . . . shall consolidate an appeal of procedural issues . . . made under this chapter . . . with a hearing or appeal on the underlying governmental action by providing for a single simultaneous hearing before one hearing officer . . . (Emphasis added.)

4. The Skagit County Code does not expressly provide for consolidation of appeals when two Process I decisions are heard, but it does call for the integration of SEPA review with development permit review. In so doing, it states that developments subject to the provisions of SEPA “shall be reviewed in accordance with the policies and procedures contained in SCC 14.12 (SEPA) and WAC 197-11.”

5. SCC 14.12.210 establishes County appeal procedures for SEPA determinations and is explicitly based on RCW 43.21C.075 and WAC 197-11-680. In other words, the County scheme is intended to be consistent with the relevant State statute and with the implementing State regulation.

6. WAC 197-11-680 is an attempt to construe and interpret the provisions of RCW 43.21C.075. It states that (except in circumstances not applicable here) the agency process “shall consolidate any allowed appeals of procedural . . . determinations under SEPA with a hearing or appeal on the underlying governmental action in a single simultaneous hearing before one hearing officer or body.” (Emphasis added.)

7. Thus, when the thicket of cross-references is penetrated, the conclusion is clear. The appropriate procedure here is for the MDNS appeal to await the County’s administrative decision on the permit application for the cell tower.

8. Should the County decide to deny the permit application, the SEPA appeal may become moot.

9. Should the County approve the application, then the MDNS appeal and the appeal of the permit decision should be consolidated and heard at one hearing before the Examiner.


10. While it is theoretically possible that an affirmative decision on the permit application will not be appealed, such an eventuality is highly unlikely. The MDNS appeal at issue in fact focuses on opposition to the underlying application rather than on compliance with SEPA. The Examiner has never seen a case in which the appellants’ sole concern was with SEPA compliance in the abstract, unconnected to a position on how the

basic permit application ought to be decided. In any event, if there were no appeal of the underlying decision, a hearing could be held on the MDNS appeal without violating the "single simultaneous hearing" rule.

11. Therefore, the Examiner has determined that the appropriate course to follow is to wait for the County's administrative decision on the underlying application. If that decision is affirmative and an appeal is filed, the two appeals relating to the same subject matter shall be consolidated and promptly scheduled for a single hearing.

12. As to any future hearing, if the appellants would rather that sessions be held in the evening, they should so advise the Planning and Permit Center in their Notice of Appeal or otherwise. The Hearing Examiner will be happy to hold an evening hearing upon request.

ENTERED this 20th day of May 2003.



Wick Dufford, Hearing Examiner