BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeal of	)	
	)	
KEN AND ANNE WINKES,	)	PL 09-0288
	)	
Appellants,	)	
	)	
v.	)	**FINDINGS OF FACT,**
	)	**CONCLUSIONS OF LAW**
SKAGIT COUNTY and	)	**AND DECISION**
VERIZON WIRELESS,	)	
	)	
Respondents.	)	
_____	)	

This is an appeal of an administrative decision to approve a Special Use Permit (PL08-0329) for the installation of a new wireless telecommunication facility (150-foot monopole and antennas) behind a building on Main Street in Conway.

The appeal hearing was held upon due notice on September 16, 2009, in the Board of County Commissioners Hearing Room, 18000 Continental Place, Mount Vernon.

The Appellants were represented by Bradford E. Furlong, Attorney at Law. The The County was represented by Marge Swint, Senior Planner, and Jill Olson, Deputy Prosecuting Attorney. Verizon Wireless (the Applicant) was represented by Charles Maduell, Attorney at Law.

The Appellants and the Respondent-Applicant both filed hearing briefs. Exhibits were admitted. Testimony and arguments were heard. From the record made, the Examiner enters the following:

FINDINGS OF FACT

1. By a decision dated July 7, 2009, the County Planning and Development Services Department (PDS) approved an Administrative Special Use Permit (PL 08-0329) for the construction of a new wireless telecommunication facility at 18620 Main Street, Conway.

2. The legal description is Lot 1-4, Block 4, Plat of the Town of Conway, within a portion of the NW1/4NE1/4 Sec. 19, T33N, R4E, W.M.

3. The proposed site is a vacant separate lot on the south side of Main Street behind the building housing Conway Foods and the U.S. Post Office. To the east are railroad tracks, and across the tracks is an agricultural processing facility with multiple buildings. To the south is a large Port of Skagit County log yard. To the immediate west is the Sund Building with a residence and residential back yard at the rear. Farther west are detached residences and yards.

4. The zoning of the site is Rural Village Commercial (RVC).

5. The proposed wireless telecommunications facility would include a 150-foot monopole, with six panel antennas flush mounted near the top. There would be outdoor equipment cabinets and a 60 KW diesel generator on an elevated platform. The platform is required because of the flood designation of the property.

6. The facility would be placed near the southeast corner of the lot within an approximately 20' x 50' fenced leased area. According to the Applicant, the 150' height is needed on the flush mount design to ensure that the antennas have sufficient clearance over the grain elevator immediately to the east for maximum coverage at this location.

7. The proposal is for a 10-foot wooden fence to surround the leased area with landscaping around the exterior. A row of six-foot Western Redcedars and Oregon Grape shrubbery would be planted along the north, west and east sides of the fence. The south boundary is screened by existing evergreens.

8. The Sund Building on the next lot to the west houses several businesses. The residential area at its rear is occupied by the Huttenstines, who maintain the building for the businesses. They have been living there for twenty-six years. The space was occupied as a residence by others for an unknown period of time before the Huttenstines moved in.

9. The yard behind the Sund building, adjacent to the residential space, is clearly a residential back yard. The Huttenstines have put in grass, flower beds, fruit trees, a pond and a typical backyard storage barn.

10. The distance from the proposed monopole site and the property line of the lot where the Huttenstines live is 75 to 80 feet. It is another few feet to the residence. Neither the property line nor the residence are as far away as 150 feet from the tower site.

11. Any finding herein which may be deemed a conclusion is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the persons and the subject matter of this proceeding.

2. SCC 14.16.720 sets forth the standards for the siting of "personal wireless services facilities." The proposal is for such a facility.

3. SCC 14.16.720(13)(b) contains the following tower design criterion:

> (b) Setback. A tower's setback shall be measured from the base of the tower to the property line of the parcel on which it is located. In the Rural Village Residential (RVR) zoning district and in land use areas where residential uses are permitted or existing, towers where permitted shall be set back from all property lines a distance of 100% of the tower height as measured from ground level. . . . (emphasis added)

4. The location of the proposed monopole is clearly too close to the property line to meet the above setback requirement. The County and the Applicant argued that this setback does not apply in this case.

5. County staff pointed to the list of high priority zones for wireless tower location that is spelled out in SCC 14.16.720(10)(b). These include Skagit County's commercial and industrial zones, with the Rural Village Commercial (RVC) zone listed among them. The staff noted that residential use is permitted only as an accessory to the industrial or commercial uses in these zones. They argued that the siting priority provided for these zones would be undermined if just because residential use is permitted under limited circumstances, the 100% setback applies in every case.

6. The Examiner agrees that this premise is probably correct. The term "permitted" in the setback requirement would seem to refer to those zones where residential use is permitted outright. Thus, in the listed high priority commercial and industrial zones, cell towers would not be subject to the 100% height setback merely because residential use is allowed as an accessory.

7. However, the Examiner notes that the setback provision also includes "existing" residential uses. Where such uses are now in being, even in zones of high priority for cell towers, the plain meaning of the code language appears to require application of the setback. The Huttenstine's residential use has, of course, been "existing" for many years.

8. In support of this approach, counsel for Appellants presented legislative history showing an ongoing concern to avoid, where possible, the proximity of cell towers to residential uses. The subject setback requirement would operate to prevent a tower from falling on a residence. Accordingly, to interpret the setback requirement to apply where residential uses are in existence would be consistent with the apparent intent to protect residential uses.

9. The Applicant sought to avoid the 100% height setback in the instant case through the application of the *ejusdem generic* rule of statutory construction. Verizon's counsel argued that the setback language, by referring to the RVR zone, limits the setback requirement to areas, like the RVR zone, that are principally characterized by residential development. The problem with this approach is that it makes the reference to "existing" residential uses superfluous.

10. The Code's high priority for siting towers in commercial and industrial zones is not undermined if the 100% of height setback applies within such zones only where the proposal is close to an "existing" residential use. Such an interpretation eliminates from the setback's coverage all areas where no residential uses are currently in being, even though at some future time they might be approved as accessories. There are probably few situations like the instant case where the presence of long-time pre-existing residential use in such a zone would interfere with plans for cell tower construction.

11. In sum, the Examiner concludes that all the language of the setback requirement should be given effect and that it applies here because of the "existing" residential use. Therefore, the tower cannot be built at the location proposed.

12. Any conclusion herein which may be deemed a finding is hereby adopted as such.

DECISION

The appeal is granted. The administrative decision approving a Special Use Permit (PL08-0329) for a proposed 150-foot monopole and associated equipment is reversed. The Special Use Permit is denied.

DONE this 14th day of October, 2009.

Wick Dufford

Wick Dufford, Hearing Examiner

RECONSIDERATION/APPEAL

As provided in SCC 14.06.180, a request for reconsideration may be filed with Planning and Development Services within 10 days after the date of this decision. As provided in SCC 14.06.110(13), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with the clerk of the Board within 14 days after the date of the decision, or decision on reconsideration, if applicable.