

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

In the Matter of the Appeal of

ERIC SIKO

from a decision by the Director,
Department of Planning and Development

Hearing Examiner File:
MUP-15-016(CU)

Department Reference:
3018132

Introduction

The Director issued administrative conditional use approval for a minor communication utility in a Lowrise 3 zone, and Eric Siko exercised his right to appeal the decision pursuant to Chapter 23.76 Seattle Municipal Code.

The appeal hearing was held on July 22, 2015, before the Hearing Examiner ("Examiner"). Parties represented at the hearing were: Eric Siko ("Appellant"), by Julie Nicoll, attorney-at-law; Verizon Wireless ("Applicant"), by Charles E. Maduell, attorney-at-law; and the Director, Department of Planning and Development, ("Department"), by William K. Mills, Senior Land Use Planner. The record was held open for the Examiner's site visit, which occurred on July 25, 2015.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise stated. Having considered the evidence in the record and viewed the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

Site and Vicinity

1. The site is addressed as 6023 SW Stevens Street and is located at the corner of 61st Avenue SW and SW Stevens Street, in the Alki Neighborhood of West Seattle. It is zoned Lowrise 3 and developed with a four-story multifamily complex, the Stevens Crest Apartments.
2. The site is surrounded by Lowrise-zoned property. To the west, north and east, property is zoned Lowrise 3. To the south, property is zoned Lowrise 1. One block to the north is Neighborhood Commercial zoning.
3. In the Lowrise 3 zone, the structure height limit is 30 feet, and telecommunication facilities are allowed an additional 10 feet in height.

4. The proposal is for a minor communications utility that consists of 12 panel antennas mounted on the side of existing rooftop penthouses with supporting equipment located in the building's basement. The antennas will extend approximately 41 feet 4 inches above the finished grade of the existing building and therefore, require administrative conditional use approval.
5. The objective of the proposal is to provide capacity and coverage enhancements to the area defined by Alki Avenue SW, Beach Drive SW, 56th Avenue SW, and roughly SW Spokane Street. *See* Exhibit 19 at p. 2. The ideal location for the facility would be near the center of the coverage area.
6. In accordance with Director's Rule ("DR") 19-2013, the Applicant submitted a search ring analysis with the application, which identified the search area within which the Applicant must locate the utility to fill a gap in coverage. *See* Exhibit 5A. The search ring extended along Alki Avenue SW from approximately 63rd Avenue SW on the west to 59th Avenue SW on the east. Exhibit 5A, ex. B. This was the second search ring developed for the project. The first search ring, developed in 2013, extended along Alki Avenue SW from approximately 61st Avenue SW to Bonair Place SW, an area that overlapped part of the second search ring and extended beyond it to the northeast.
7. The Applicant's radiofrequency engineer ("RF Engineer") who developed the search ring instructed that the search for a facility site should be limited to buildings with a minimum height of 35 feet because the antennas needed to be located above the average height of all surrounding buildings. Therefore, the Applicant's search within both search rings was limited to three- and four-story buildings.
8. Some properties within the first search ring that met the RF Engineer's criteria were located within the Urban Residential Shoreline designation in which telecommunication facilities are prohibited. For the remaining eligible properties, the Applicant encountered owners who were either unresponsive to inquiries or not interested in leasing space for the proposal. This led to the development of the second search ring.
9. The boundaries for the second search ring were based upon the coverage analysis for the area and the height requirements for the antennas. *See* Exhibit 6A, "With New Site" map.
10. The Applicant's analysis for the second search ring included a list of the seventeen sites reviewed. Exhibit 5A, ex. C. Only five, including the proposal site, were of sufficient height. *Id.*
11. The Department issued a correction notice to the Applicant, noting that "it appears that more appropriate and less intrusive areas are available to provide the required minor telecommunications facility ... Please provide documentation outlining why 6023 SW Stevens Street was chosen ... instead of the commercially zoned property located approximately 275 feet north of the subject site. Exhibit 10 at 2. The Applicant responded that the requested documentation was included at page 12-13 of the

application, Exhibit 5A. On those pages, the Applicant explained that one commercially-zoned building on Alki Avenue SW included an existing telecommunications facility that covers most of the available rooftop space, and that two other commercially-zoned buildings on Alki Avenue SW did not have willing property owners. An additional building with sufficient height was located in a Lowrise zone but had an owner who was either unresponsive or unwilling to lease space for the facility. Exhibit 5A, ex. C.

12 . In addition to the project application and the Radio Frequency Documentation, Exhibits 5A and 6A respectively, the Applicant submitted a “Non-ionizing Electromagnetic Radiation Report” with engineering certification, which includes the calculations of radiofrequency power density for the proposed utility, and photo simulations with and without screening for the proposed rooftop equipment. Exhibits 4, 7 and 14.

Director’s Review

13. The Director determined that the proposal was exempt from review under the State Environmental Policy Act.

14. The Director received over 35 comment letters on the proposal, most of which were signatures on a form letter. The comments raised concerns with potential impacts on property values and health and questioned the need for the facility.

15. The Director determined that the application met all applicable Code criteria for wireless communication utilities and issued a decision on March 23, 2015 approving the conditional use application. Exhibit 1.

Appeal

16. The Appellant timely appealed the Director’s decision, raising numerous issues. At hearing, the Appellant stated that all issues except appeal issue 2 were withdrawn. Appeal issue 2 reads as follows: “In violation of SMC 23.57.011.B, the project will be substantially detrimental to the residential character of nearby residentially zoned areas and the facility and the location proposed are not in the least intrusive facility at the least intrusive location consistent with effectively providing service.”

Applicable Law

17. SMC 23.57.011.B provides that a minor communication utility may be permitted as an administrative conditional use if it meets the development standards of SMC 23.57.011.C and the applicable criteria set forth in SMC 23.57.011.B. As noted in the appeal, SMC 23.57.011.B.1 states that “[t]he project shall not be substantially detrimental to the residential character of nearby residentially zoned areas, and the facility and the location proposed shall be the least intrusive facility at the least intrusive location consistent with effectively providing service.”

18. Director's Rule ("DR") 19-2013 establishes an order of preference for the location of these utilities. Multifamily zones, including Lowrise zones, are part of the second tier of preferred locations. Commercial zones are part of the first tier. Exhibit 9 at page 2 of 5.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to Chapters 23.76 SMC. The Director's decision to grant administrative conditional use approval is not entitled to deference. SMC 23.76.022 C.7. Because Chapter 23.76 does not establish that the Appellant has the burden of proof in this appeal, the Department must make a *prima facie* showing that the decision complies with the applicable Code requirements. The burden then shifts to the Appellant to show by a preponderance of the evidence that the decision did not meet those requirements. *Hearing Examiner Rules of Procedure*, Rule 3.17.

2. The Department made the required *prima facie* showing. The application included documents showing the need for an additional facility 41+ feet in height to provide effective service in the Alki community. It also included documentation that the Applicant had studied properties in both the Lowrise and Neighborhood Commercial zones, but that only the proposal site provides the requisite zoning, height, rooftop space, and willing property owner.

3. The Appellant argued that the Department's decision failed to find that the proposed facility would be the least intrusive facility in the least intrusive location, but the decision clearly does so on page 2 and in the summary on page 3.

4. The Appellant also argued that the Applicant failed to comply with all application requirements of DR19-2013, but the issue on appeal is compliance with SMC 23.57.011.B.1, as that Code section is interpreted by the Director in Section A of DR19-2013, not compliance with the application submittal requirements in Section B of the rule.

5. The Appellant questioned the need for the facility, arguing that effective service could be provided using a smaller search ring that would be located to the northeast of the Applicant's second search ring. However, the Applicant's first search ring was located northeast of the second, but it included no eligible properties with willing owners. The Appellant's expert witness cited what he considered good capacity within much of the Applicant's desired coverage area, with the exception of a four or five block expanse, but his measurements were taken from his telephone, not with calibrated instruments that would meet industry standards. Further, even if the readings were accepted as accurate, the Appellant's expert and the Applicant's RF Engineer interpreted them differently. The Appellant's expert testified that he believed a reading of 88 showed good capacity, whereas the RF Engineer's map shows areas with readings of 85-95 as being out, or nearly out of capacity. A showing that engineers can differ in their interpretation of capacity data is not sufficient to meet the Appellant's burden of proof.

6. The Appellant contends that it is technically feasible to locate the facility on one- or two-story structures, and that because the Applicant failed to consider such structures in the Neighborhood Commercial zone, the proposal is not the least intrusive facility in the least intrusive location. It is true that the Applicant's and Appellant's engineers both agreed that it may be possible for the Applicant to achieve the requisite increase in coverage and capacity by installing telecommunication facilities on structures lower than 35 feet in height. But the evidence shows that because of building shadows and surrounding "clutter" at lower heights, multiple facilities of various sizes would be needed to achieve coverage equal to that provided by the proposal, and some would still need to be located in a multifamily zone. That scenario would not meet the Code requirement for the least intrusive facility, as interpreted by the Director in DR19-2013, which states that the facility "must be designed and placed in a manner that will result in the least amount of visual ... impacts," including aesthetics. Exhibit 9 at 2.

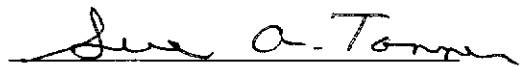
7. The Appellant presented no evidence that the proposed facility would be substantially detrimental to the residential character of nearby residentially zoned areas, and that claim is therefore waived.

8. The preponderance of the evidence in the record supports the Director's decision approving the administrative conditional use application, and it should therefore be affirmed.

Decision

The Director's decision is **AFFIRMED** as to appeal issue 2. All other appeal issues are **DISMISSED**.

Entered this 29th day of July, 2015.


Sue A. Tanner
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. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is

issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

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. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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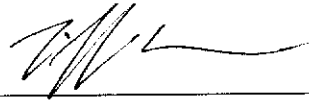
**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **Stop Alki Cell Towers**, Hearing Examiner File: **MUP-15-016 (CU)**, in the manner indicated.

Party	Method of Service
Stop Alki Cell Towers c/o Julie Nicoll Element Law PLLC 1424 Fourth Ave, Suite 528 Seattle, WA 98101 julie@elementlawpllc.com Eric Siko eric@linkedsystems.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Verizon Wireless c/o Chuck Maduell Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101 chuckmaduell@dwt.com Donna Spaulding donnaspaulding@dwt.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Branin Burdette DPD Branin.Burdette@seattle.gov William Mills William.Mills@seattle.gov Sue Putnam Sue.Putnam@seattle.gov PRC PRC@seattle.gov DPD Routing Coordinator DPD_Routing_Coordinator@seattle.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

Dated: July 29, 2015



Tiffany Ku
Legal Assistant