

**BEFORE the HEARING EXAMINER for the
CITY of LYNNWOOD**

DECISION

FILE NUMBER: CUP-010083-2023

APPLICANT: ¹ Dish Wireless, LLC
5701 South Santa Fe Drive
Littleton, CO 80120

TYPE OF CASE: Conditional Use Permit to replace an existing wireless communication facility with a new wireless communication facility

STAFF RECOMMENDATION: Approve

EXAMINER DECISION: GRANT subject to condition

DATE OF DECISION: September 26, 2023

INTRODUCTION ²

Dish Wireless, LLC (“Dish”) seeks a Conditional Use Permit (“CUP”) to replace an existing wireless communication facility (“WCF”) with a new WCF.

Dish filed the CUP application on June 27, 2023. (Exhibits 1, PDF 1; 2 ³) The Lynnwood Development and Business Services Department, Community Planning Division, (“Planning”) deemed the application to be complete on July 21, 2023. (Exhibits 1, PDF 1; 11) Planning issued a Notice of Application on August 1, 2023. (Exhibit 12)

The subject property is known as the Meadowdale Playfields, located at 16700 66th Avenue W. Its Assessor’s Parcel Number is 00513100008200 (“the Playfields”). (Exhibit 1, PDF 1 & 3)

The Lynnwood Hearing Examiner (“Examiner”) viewed the subject property via Google Earth imagery: Overhead imagery dated August 23, 2022; Street View imagery dated September 2017.

¹ The Staff Report lists Core One Consulting as the applicant “on behalf of Dish Wireless LLC”. Core One Consulting filed the application as the agent for Dish Wireless, LLC, not as the applicant. Dish Wireless, LLC is the applicant. Applicant’s mailing address obtained from Exhibit 2, the Application.

² Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

³ Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

The Examiner held a hybrid open record hearing on September 21, 2023: In-person participation was available at the City Hall; remote participation was available through the “Zoom” platform. Planning gave notice of the hearing as required by the Lynnwood Municipal Code (“LMC”). (Exhibit 13)

The following exhibits were entered into the hearing record during the hearing:

Exhibits 1 - 15: As enumerated in Exhibit 1, the Planning Staff Report

Section 1.35.025 LMC requires that decisions on project permit applications be issued within 120 calendar days after the application is found to be complete; subsection 1.35.025(A) LMC lists four exclusions from the 120-day count, one of which is an extension mutually agreed upon by Planning and the applicant. The open record hearing was held on or about day 55. (Exhibit 1, PDF 1)

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. The Playfields are owned by Edmonds School District No. 15 whose agent signed the application. (Exhibit 2) The Playfields contain three baseball fields, two multi-purpose fields, parking, and a children’s play area. The baseball fields are fenced and lighted. The outfield lights are mounted on tall utility poles located just beyond the outfield fences. At least two of those light poles are taller than the rest and are topped with WCFs. (Exhibits 7; 9; Google Earth Street View imagery) Dish wants to replace the WCF pole located behind the right field fence of the northwestern baseball field with a stronger pole to support its equipment.
2. The WCF existing pole that will be removed is wood; the replacement pole will be steel. The replacement pole will be located where the existing pole is located. The existing and replacement poles will be essentially the same height. The field light array will be moved to the replacement pole and mounted at the same height as it currently is. Dish’s antenna array will be mounted at the top of the new pole similar to the existing antenna array. The ground support equipment’s “H” frame near the base of the pole will be retained; the existing equipment will be replaced with Dish’s electrical support equipment. Dish’s WCF will occupy no more of the Playfields property than does the existing WCF. Existing landscaping will not be altered. (Exhibits 6 & 7)
3. No testimony or evidence was entered into the record by the general public either in support of or in opposition to the application.
4. Dish’s proposal is categorically exempt from the State Environmental Policy Act (“SEPA”) threshold determination process pursuant to WAC 197-11-800. (Exhibit 1, PDF 7)

5. Special requirements apply to uses located in the P-1 zone. [LMC 21.44.100(C)] Additional requirements apply to Public Utility Facilities located in P-1/RS-8 zones. [LMC 21.42.110(B)] Planning has evaluated Dish's proposal against both sets of requirements and finds the proposal consistent with all applicable requirements. (Exhibit 1, PDF 2 – 5) Planning's analyses have not been challenged; the Examiner concurs with and adopts Planning's analyses.
6. Planning recommends approval without any conditions. (Exhibit 1, PDF 7) Planning presumes that Dish will follow Exhibit 7, the plans that have been submitted, in development of the project. (Testimony)
7. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK ⁴

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

A CUP is a Process I application which is subject to an open record hearing before the Examiner. The Examiner makes a final decision on the application which is subject to the right of reconsideration and appeal to Superior Court. [LMC 1.35.100, .168, and .175 and 21.24.050]

Review Criteria

The review criteria for CUPs are set forth at LMC 21.24.100 and .150:

... In considering any conditional use permit, the hearing examiner shall prescribe any conditions that he/she deems to be necessary to or desirable for the public interest, and where appropriate may stipulate that the permit is temporary and establish an expiration date. However, no conditional use permit shall be granted unless it is found:

A. That the use for which such a permit is sought will not be injurious to the neighborhood or otherwise detrimental to the public welfare; and

B. Will be in harmony with the general purpose of [the zoning code].

The hearing examiner may allow relaxation of the development standards of this title if he/she finds that alternative amenities, improvements, proposed location of uses or structures, or other features incorporated into the proposal are in harmony with the general purpose of this title and would provide equal or better protection to the public interest than would the standards proposed to be relaxed.

⁴ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

[LMC 21.24.100]

In determining findings, the hearing examiner shall take into account the character and use of adjoining buildings and those in the vicinity, the number of persons residing or working in such buildings or upon such land, traffic conditions in the vicinity, compliance with any special conditional use criteria for that specific use set forth in [Chapter 21.24 LMC] and all factors relevant to the public interest.

[LMC 21.24.150]

A “consistency determination” is also required for every project application. A consistency determination follows four steps set forth at LMC 1.35.070. Consistency criteria are:

1. Type of land use permitted at the site, including uses that may be allowed under certain circumstances if decision criteria are met;
2. Density of residential development (if applicable); and,
3. Availability and adequacy of public facilities (for those facilities identified in the comprehensive plan, if the plan or the city’s development regulations provide for funding of these facilities).

[LMC 1.35.070(A)]

Vested Rights

“Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191 (2014), *review denied*, 182 Wn.2d 1004, 342 P.3d (2015)]

In 2014 the State Supreme Court flatly declared: “While it originated at common law, the vested rights doctrine is now statutory.” [*Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014)] The *Potala* court rejected a contention that the filing of a complete shoreline substantial development permit application vested development rights because no statutory provision established vested rights for shoreline permits. [*Supra*, at 196-206]

CUPs are not the subject of any state vesting statute. If Lynnwood had a local vesting ordinance applicable to land use applications, the Examiner would be obliged to follow it as enacted. [*Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994); *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009)] But the City has no such local ordinance. Thus, the Examiner must follow the most current case law.

Under the most current case law, there is no vesting for CUP applications because there is no statutory provision providing vesting for such applications.

Vesting is not particularly important in this case as the City has made no development regulations changes between the time the application was filed and this date.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [LMC 1.35.155]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. The request complies with CUP criterion LMC 21.24.100(A). The new pole and antenna array will replace an existing pole and antenna array of virtually the same size and configuration. The Dish facility will not alter whatever impact the existing WCF has had on the neighborhood.
2. The request complies with CUP criterion LMC 21.24.100(B). The “general purpose of the zoning code” is to

avoid[] or abat[e] public nuisances. This title also intends to promote the protection and promotion of the quality of the natural environment and the health, safety, morals, and other aspects of the general welfare of present and future inhabitants of the city of Lynnwood in accordance with the comprehensive plan and state law, judicial decisions, and Central Puget Sound Growth Management Hearings Board decisions regarding land use regulations. To these ends, it is the intent of these regulations to implement the city of Lynnwood comprehensive plan and the future land use plan map.

[LMC 21.04.015] The new pole and antenna array will replace an existing pole and antenna array without significantly affecting the neighborhood. The new WCF will be as consistent with adopted City policies and regulations as has been the existing WCF.

3. The request complies with CUP criterion LMC 21.24.150. This WCF is not the only WCF on the Playfields property. No evidence exists in the record of any conflict between the WCFs on the Playfields and the surrounding neighborhood.

4. The proposal passes the “consistency” test: A WCF is permitted as a Conditional Use in the P-1 zone just as it is in the RS-8 zone; density is not applicable as this is not a residential use; and adequate utilities are available to serve the replacement WCF.
5. A CUP embodies the concept of approval of a specific development proposal. A CUP evaluation is based upon the specific development plans submitted by the applicant. It is appropriate, therefore, that any approval clearly identify the plans which are being approved. The Planning recommendation as drafted does not do so. Exhibit 7 constitutes the plans which should be approved. (Exhibit 6, the “landscape plan,” is not really a plan: It is simply a statement that existing landscaping will not be disturbed. That fact is demonstrated on Exhibit 7. No reference to Exhibit 6 need be made.) Reference to Exhibit 7 will be incorporated into a new Condition.
6. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner’s site view, the Examiner **GRANTS** the requested Conditional Use Permit to replace an existing wireless communication facility with a new wireless communication facility **SUBJECT TO THE FOLLOWING CONDITION:**

This Conditional Use Permit is subject to compliance with all applicable provisions, requirements, and standards of the Lynnwood Municipal Code, standards adopted pursuant thereto, and the following special condition:

Exhibit 7 is the approved site development plan for this Conditional Use Permit. Revisions to approved site plans are subject to the provisions of LMC 1.35.180.

Decision issued September 26, 2023.

John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ⁵

Katie Murrer

Catherine Kato

⁵ The official Parties of Record register is maintained by the City’s Hearing Clerk.

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Lynnwood Development and Business Services Department a written request for reconsideration within seven calendar days following the issuance of this Decision in accordance with the procedures of LMC 1.35.168. Any request shall specify the error of law or fact, procedural error, or new evidence which could not have been reasonably available at the time of the hearing conducted by the Examiner which forms the basis of the request. See LMC 1.35.168 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

This Decision is final subject to the right of a party of record (See LMC 1.35.148.) with standing, as provided in RCW 36.70C.060, to file a land use petition in Superior Court in accordance with the procedures of LMC 1.35.175 and the Land Use Petition Act [Chapter 36.70C RCW]. See LMC 1.35.175 for additional information and requirements regarding judicial appeals.

<p>The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”</p>
