



**NOTICE OF FINAL ORDER ON RECONSIDERATION  
PRUNE HILL WIRELESS COMMUNICATIONS FACILITY  
(FILE #CUP15-01)**

**Reconsideration Issued:** September 1, 2016

**Decision Issued:** August 5, 2016

**Staff Contact:** Sarah Fox, Senior Planner  
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**Applicant:** Parallel Infrastructure, LLC

**Owner:** Jean M. Nagel

**Location:** 2829 NW 18<sup>th</sup> Ave. Camas, WA      **Zoning:** R-12

**Parcel:** 124979-000

**THIS IS TO SERVE AS NOTICE** that a request for reconsideration of the Prune Hill Wireless Communications Facility (City file #CUP15-01) decision has been **DENIED**. The Hearings Examiner Final Order on Reconsideration is attached to this notice.

**18.55.235 - Reconsideration by the hearings examiner (in part)**

...

C. The hearings examiner may, after review of the materials submitted in conjunction with the reconsideration request, and review of the open record hearing transcript, take further action as he or she deems proper; including, but not limited to, denying the request, modifying the decision, or affirming the decision.

D. The hearings examiner shall issue a decision on a request for reconsideration within forty-five (45) days of the filing of the request for reconsideration. When a request for reconsideration has been timely filed, **any appeal to Clark County Superior Court under the Land Use Petition Act shall be filed within twenty-one (21) days after a hearings examiner issues its decision on the request for reconsideration.**

**BEFORE THE LAND USE HEARING EXAMINER  
FOR THE CITY OF CAMAS, WASHINGTON**

Regarding an application by PI Telecom	)	<b>FINAL ORDER ON</b>
Infrastructure, LLC for CUP approval to construct	)	<b><u>RECONSIDERATION</u></b>
and operate a 175-foot monopole telecommunication)	)	
tower and accessory equipment at 2829 NW	)	<b>CUP15-01</b>
18 <sup>th</sup> Avenue in the City of Camas, Washington	)	<b>(Prune Hill Wireless Facility)</b>

**A. SUMMARY**

1. On August 5, 2016 City of Camas Hearing Examiner Joe Turner (the "examiner") issued a Final Order approving this application subject to conditions (the "Final Order"). CMC 18.55.235 provides that any party may request reconsideration of the examiner's decision if they believe that the examiner's decision is "[b]ased on erroneous procedures, errors of law or fact, or the discovery of new evidence which could not be reasonably available at the public hearing..."

2. On August 19, 2016 attorney Mark Erikson, representing Glenn Watson and the Friends of Prune Hill ("Friends") filed a request for reconsideration of the examiner's Final Order. Friends argued that:

a. The applicant must demonstrate a need for the proposed facility, that there is a significant gap in coverage and the proposed facility is the minimum necessary to fill that gap;

b. The examiner's decision is void because the City failed to update its Telecommunications Ordinance as required by CMC 18.35.010.0A;

c. The proposed facility is a "major telecommunications facility," which is prohibited in residential zones;

d. The visual impacts of the facility will have a significant adverse impact on the value of surrounding properties;

e. CMC 16.33.010.B(1) is not limited to views of Mt. Hood and the Columbia River from identified public areas, this standard also protects private views from surrounding residences; and

f. The applicant is required to consider alternative locations for the proposed antennae.

3. Based on the findings provided or incorporated herein, the examiner denies the petitioners' reconsideration request.

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**B. DISCUSSION**

1. CMC 18.55.235 provides:

Any party of record believing that a decision of the hearings examiner is based on erroneous procedures, errors of law or fact, or the discovery of new evidence which could not be reasonably available at the public hearing, may make a

written request to the examiner, filed with the city clerk, to be accompanied by an appeal fee, for reconsideration by the examiner.

2. CMC 18.55.235.B provides, in relevant part:

Content. The request for reconsideration shall contain the following:

...

3. The specific aspect(s) of the decision being appealed, the reasons why each aspect is in error as a matter of fact or law, and the evidence relied on to prove the error. If the petitioner wants to introduce new evidence in support of the appeal, the written appeal must explain why such evidence should be considered.

3. The examiner further finds that Friends' request for reconsideration is insufficient to comply with the requirements of CMC 18.55.235. The reconsideration process is not intended to allow the parties another opportunity to make their arguments. Reconsideration is provided to correct errors of law or fact or to allow consideration of newly discovered evidence that was not reasonably available at the original hearing.

4. In this case Friends' failed to identify any alleged erroneous procedures or errors of law or fact in the examiner's Final Order. Friends' merely reiterated the same issues that were raised at the hearing. With the exception of the periodic review argument, all of the issues raised in the request for reconsideration were raised during the public hearing and open record period. Mr. Erikson provided some new argument in support of those issues, but those arguments are not persuasive, as discussed below.

5. Friends reiterated their argument that the applicant is required to demonstrate a significant gap in coverage and the proposed facility is the minimum necessary to fill that gap. However, as discussed in the Final Order, The City of Camas has not adopted this test.

a. The federal cases cited by Friends, *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir., 2005) and *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987 (9th Cir., 2009), do not support the argument that applicant must demonstrate a need for the facility in this case. These cases merely recognize the local jurisdictions authority to require a demonstration of need. The cases do not impose such a requirement. Both *MetroPCS* and *T-Mobile* involved local ordinances that expressly required compliance with certain standards.<sup>1</sup> As discussed in the Final Order, the City of Camas has not adopted such a standard, other than the colocation requirement of CMC 18.35.140.A.

<sup>1</sup> [T]he San Francisco Planning Code explicitly authorizes the consideration of community need in evaluating conditional use permit applications. San Francisco Planning Code § 303(c)(1) (directing the City Planning Commission to consider whether "the proposed use . . . is necessary or desirable for, and compatible with, the neighborhood or the community")...

*MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 725 (9th Cir., 2005)

The [Anacortes Municipal Code] provides that when considering a special use permit, the City may consider a number of factors including the height of the proposed tower, the proximity of the tower to residential structures, the nature of uses on adjacent and nearby properties, the surrounding topography, and the surrounding tree coverage and foliage.

*T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 994 (9th Cir., 2009)

b. Friends point out that the Code requires applicants for a variance to the tower height standard to demonstrate a need for the proposed facility in the specific location proposed. CMC 18.35.080.D. However that provision does not support Friends' argument that all applicants for wireless communications facilities are required to demonstrate a need for a proposed facility. To the contrary, it is reasonable for the City to impose additional requirements when an applicant is proposing to vary from the standard requirements of the Code.

i. In addition, inclusion of the "necessary" standard in the variance criteria and not in the criteria for other wireless facilities supports a conclusion that the City Council did not intend to require a demonstration of need for facilities that do not involve a variance. The City Council required evidence of need when an applicant is requesting a variance. If the City Council had intended to require evidence of need for other towers it clearly could have said so. Including a requirement in one section of the code and not another demonstrates an intent to not impose the requirement in the second section. *State v. Delgado*, 148 Wash.2d 723, 63 P.3d 792, 795 (2003).

c. Friends again cite to CMC 18.35.010, the purpose statement for the telecommunications ordinance, arguing that the Code must be construed to require a demonstration of need for the facility in order to fulfill the goals of encouraging wireless facilities in non-residential areas and the colocation and clustering of wireless facilities. As discussed in the Final Order, CMC 18.35.010 does not set out applicable approval criteria. It is merely a purpose statement. The general goals of a purpose statement are implemented through compliance with the specific requirements of the approval criteria. See *Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 98, 83 P.3d 433, review denied, 152 Wn.2d 1015 (2004) (Specific zoning laws control over general purpose statements). The City, "Encourage[s] the location of wireless communication support structures in nonresidential areas" by requiring faster and cheaper review for wireless facilities proposed in industrial areas. Wireless facilities are an outright permitted use in industrial areas, whereas such facilities are subject to Type III conditional use review when proposed in residential areas.

i. The City could adopt additional regulations that would further promote these purposes, such as requiring applicants for wireless facilities in residential areas to demonstrate that the facility must be sited in a residential area in order to fill an identified coverage gap. However the current code does not include such a requirement and the examiner cannot interpret the plain language of the Code to insert such a requirement. "Plain language does not require construction." *State v. Delgado*, 148 Wash.2d 723, 63 P.3d 792, 795 (2003).

6. Friends again assert that the facility is a "major telecommunications facility," which is prohibited in residential zones. CMC 18.07.030 - Table 1.

a. As noted in the Final Order, CMC 18.35.030 provides the following relevant definitions:

"Major telecommunication facility" means a utility use in which the means for transfer of information is provided. These facilities, because of their size, typically have impacts beyond their immediate site. Major telecommunication facilities shall include, but not be limited to, FM and AM radio transmission towers, UHF and VHF television transmission towers, and earth stations. Major telecommunication facilities do not include

communication equipment accessory to residential uses, nor the studios of broadcasting companies such as radio or television stations.

"Minor telecommunication facility" means a telecommunication facility in which the transfer of information is provided but which generally does not have significant impacts beyond the immediate location of the facility. These facilities are smaller in size than a major telecommunication facility.

"Wireless communication facilities" means the site, structures, equipment, and appurtenances used to transmit, receive, distribute, provide, or offer wireless telecommunications services. This includes, but is not limited to antennas, poles, towers, cables, wires, conduits, ducts, pedestals, vaults, buildings, electronics, and switching equipment.

b. As noted in the Final Order, the proposed facility will not transmit FM or AM radio signals, UHF or VHF television signals, is not an "earth station, nor is it similar to any of these listed uses. Therefore, it is not a "major communications facility" as defined by CMC 18.35.030.

c. In addition, major telecommunications facilities and wireless communication facilities are separate and distinct uses. Wireless communication facilities are allowed in residential areas but major telecommunications facilities are prohibited. The examiner finds that the proposed facility clearly meets the definition of wireless communication facilities. The facility will provide wireless telecommunications services and is subject to the federal telecommunications act. Therefore, it is a "wireless communication facilities" as defined by CMC 18.35.030 and it cannot be a major telecommunications facility.

7. Friends again argue that the proposed facility will have a significant adverse impact on the value of surrounding residential properties.

a. As discussed in the Final Order, the City cannot consider property value impacts related to concerns about potential adverse health effects from the facility. *AT&T v. City of Carlsbad*, 308 F. Supp. 2<sup>nd</sup> 1148, 1162 (2003).

b. Friends are correct that the City can condition or deny the proposed facility based on visual impacts that are not premised on health effects, including property value impacts resulting from the facilities visual impacts. *T-Mobile NE v. Loudoun County*, 903 F.Supp.2d 385, 407 (E.D. Va. 2012), affirmed, 748 F.3e 185 (4<sup>th</sup> Cir. 2014); *Voice Stream PCS I v. Hillsboro*, 301 F.Supp.2d 1251, 1258 (D. Or. 2004)..

c. In this case, the applicant submitted studies demonstrating that the visual impact of wireless communications towers do not have a significant adverse impact on property values. Exhibit 109. Opponents argued that the facility will have a significant adverse impact on property values due to its height and impact on views. The examiner finds that the published studies provided by the applicant are more persuasive than the unsupported testimony of area residents.

i. Area residents argued that the facility will impact views of Mt. Hood from their residences. However the applicant and City submitted evidence demonstrating that the tower will not have a significant impact on views of Mt. Hood from adjacent properties. As shown in Exhibit 91, the existing church and evergreen trees west of the site block views of Mt. Hood from homes directly west of the site. As shown in the photos included in Exhibit 109, the tower will have no impact on Mt. Hood views from properties to the northwest and southwest of

the site. The tower is not located within the line of site between nearby residences and the mountain.

d. As discussed above and in the Final Order, the purpose statement of CMC 18.35.010 is not an approval criterion. The goals of "[m]inimiz[ing] adverse visual, aesthetic...impacts..." and "Encourag[ing] the design of such facilities to be aesthetically and architecturally compatible with the surrounding built and natural environment" are implemented through the applicable approval criteria, which authorize the approval authority to require fencing, landscaping, strategic placement adjacent to existing buildings or vegetation, and "stealth" designs to minimize adverse aesthetic and visual impacts, require the use of peaked roof lines, painted surfaces, and wooden fences in residential areas, and impose other conditions that minimize the cumulative aesthetic, visual, or safety impacts of additional wireless communication facilities in the surrounding area. CMC 18.35.110.A. The examiner imposed several of these requirements as conditions of approval for this facility.

8. The examiner finds that CMC 16.33.010.B does not protect views from private property. This section provides, in relevant part:

1. It is the city's policy to protect public views of significant natural and human-made features: Mount Hood and major bodies of water including the Columbia River, Lacamas Lake and the Washougal River. These include public places consisting of viewpoints, parks, scenic routes, and view corridors identified in the comprehensive plan and the comprehensive park and recreation plan.
2. The responsible official may condition or deny a proposal to eliminate or reduce its adverse impacts on designated public views or open space networks.

The plain language of this section is clearly limited to "public views." The examiner finds that the text of the code must be interpreted to give meaning to all of the words and to avoid rendering any language superfluous. ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.") *Jongeward v. BNSF Ry. Co.*, 174 Wash.2d 586, 278 P.3d 157, 170 (2012). Friends' interpretation, that this section applies to all views of the listed landmarks, would render the word "public" superfluous and without meaning. The examiner finds that CMC 16.33.010.B only applies to public views.

9. The Code requires the applicant submit a collocation evaluation study as an application requirement. CMC 18.35.040.A. The applicant did so, thereby fulfilling this requirement. Nothing in the plain language of the Code requires the collocation evaluation study identify a significant gap in coverage that the proposed facility is intended to fill. The Code allows applicants to determine the size of the search ring. CMC 18.35.040.A(2) requires applicants mail a letter to other service providers identifying the location of their proposed facility and stating: "Please inform us whether you have any wireless facilities located within \_\_\_feet of the proposed facility, which may be available for possible collocation opportunities." If the City Council had intended to require evidence of "need" for the facility, it could have said so as it did in the variance criteria of CMC 18.35.080.D.

a. CMC 18.35.040.B requires, "Certification from a licensed radio engineer indicating whether the necessary service is technically feasible if provided by collocation at the identified site(s) by the other provider(s)." However the Code does not define the phrase,

"necessary service." There is no evidence that the City Council intended this phrase to mean the minimum service necessary to fill a significant gap in coverage. Based on the text and context of the Code, the examiner finds that the most reasonable interpretation of the phrase, "necessary service" is the service the proposed facility is intended to provide. CMC 18.35.040.B only requires evidence that it is feasible to provide the "necessary service" at a potential colocation site. The Code does not require any evidence of "necessary service" at proposed new tower locations.

10. Friends are correct that CMC 18.35.170 requires periodic review of the City's telecommunications ordinance at least every two years. The City reviewed and revised the telecommunications ordinance in 2011 (Ordinance 2612) and 2014 (Ordinance 2691). In any case, this application must be judged based on the laws in effect when the application filed. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (Wash., 1997). In addition, Friends provided no support for their assertion that the City's alleged failure to conduct period review renders the approval of this application void or that the Code must be interpreted to include a requirement that applicants identify a significant gap in coverage and the proposed facility is the least intrusive means of filling the gap.

#### **D. CONCLUSION**

Based on the above findings and discussion, the examiner concludes that, with one exception, Friends failed to allege any erroneous procedures, or errors of law or fact. The reconsideration request merely reiterated issues raised at the hearing and during the open record period. Friends' additional arguments regarding these issues are not persuasive. Friends raised a new issue regarding period review. However as discussed above, the City appears to have complied with its periodic review requirements and Friends failed to provide any support for their assertion that the City's alleged failure to conduct required periodic review renders the Final Order void. Therefore the examiner should deny the petitioners motion for reconsideration.

#### **E. DECISION**

Based on the findings, discussion, and conclusions provided or incorporated herein and the public record in this case, the examiner hereby denies Friends' motion for reconsideration.

DATED this 1<sup>st</sup> day of September 2016.



Joe Turner, AICP  
City of Camas Land Use Hearing Examiner