



MULTNOMAH COUNTY
LAND USE PLANNING DIVISION
1600 SE 190TH Avenue Portland, OR 97233
(503) 248-3043 FAX: (503) 248 -3389

Decision of Hearings Officer

Case File: CS 0-2
Applicant: American Tower Corporation
Hearings Officer: Liz Fancher
Hearing Date & Time: Wednesday, February 16, 2000, 1:00 PM

PROPOSAL: A request for approval of a Community Service (CS) Use application for a time extension of CS 1-97. The approval for CS 1-97 was issued by the Board of County Commissioners with the issuance of the Board Final Order on February 3, 1998. The application, CS 1-97, will expire on February 3, 2000 unless a time extension is granted. Under the provisions of MCC 11.15.7010(B), the applicant requests a six-month time extension. The site is located in the Multiple Use Agriculture (MUA-20) zone. A Pre-Application (PA 0-2) Meeting for the proposal was held on February 2, 2000.

LOCATION: 14443 NW Charlton Road.
T2N, R1W, Section 16, Tax Lot 7 at 3.50 acres.
R#96116-0070.

APPLICANT: Don Larson
American Tower Corporation
3141 SW Barbur Blvd. #1
Portland, OR 97201

PROPERTY OWNER: Sauvie Island Grange #840
18143 NW Reeder Road
Portland, OR 97231

DECISION

The hearings officer has reviewed the County's code and has failed to find any standards and criteria by which to approve or deny the submitted application for an extension of time. While it is clear that the County intended to create a process for the review and approval of time extensions, it did not follow through and adopt criteria by which the hearings officer can judge the merits of the application. The hearings officer is required by ORS 215.415 to make her decision based on standards and criteria set forth in the zoning ordinance or land use regulations of the County. ORS 215.416 (8) & (9). The standards must inform interested parties of the basis on which applications will be approved or denied. Lee v. City of Portland, 57 Or App 798, 646 P2d 662 (1982). In this setting, any action by the hearings officer to

either grant or deny the application based on pure discretion would be arbitrary and capricious and would be reversed by the Land Use Board of Appeals. See Heidergerken v. Marion County, ___ Or LUBA ___ (1998). In Heidergerken, LUBA remanded a County decision that denied an extension request based on ordinances that are very similar to those adopted by Multnomah County because the decision was not based on ordinance criteria.

The hearings officer lacks the power to craft new provisions by which to judge the extension, either by a liberal interpretation of existing code provisions or by adding language to the code. Gage v. City of Portland, 319 Or 308, 877 P2d 1187 (1994)(hearings officer not entitled to deference in interpreting code as he lacked power to legislate); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 218, 843 P2d 992 (1992)(City may not amend its ordinance under the guise of interpretation). The proper course of action is for the County to adopt criteria to govern the review of extension requests. As no criteria exist to govern review, the hearings officer lacks the ability to approve the extension request.

There are good public policy reasons to allow for the extension of land use permits, under the proper circumstances. When the law is essentially the same, there is very little reason to force an applicant, the County and neighbors to engage in an expensive and lengthy rehearing of a matter that has already been settled once before. What is clear, however, is that the County must first act legislatively to complete its permit extension process.

NATURE OF APPLICATION:

This is an application for a six-month extension of CS-1-97, a decision that granted approval of a Community Service Use. The applicant requested an extension of time in an application letter dated January 21, 2000 from Don Larson of American Tower Corporation to Kathy Busse, Planning Director of Multnomah County. The applicant is applying for an extension under the provisions of MCC 11.15.7010(B).

CS 1-97 received final approval from Multnomah County in the February 3, 1998 Final Order of the Board of County Commissioners. The order approved the use of the site at 14443 NW Charlton Road (R#96116-0070) for a cellular communications tower and related facilities and was effective when issued. The subject property is a 3.50-acre site that is located at 14443 NW Charlton Road (R#96116-0070) in the Multiple Agriculture (MUA-20) zone on Sauvie Island.

Related Cases: PA 29-96, CS 1-97, DR 8-99, MC 0-1, and PA 0-2.

STAFF AND APPLICANT COMMENTS:

The hearings officer adopts the findings of fact provided by the applicant and staff as findings of the hearings officer, except as indicated otherwise.

Applicant:

Narrative dated January 21, 2000 for PA 0-2 and CS 0-2.

The purpose of this letter is to request an extension of time for completion of development under Conditional Use CS 1-97 per Multnomah County Code (MCC) Section 11.15.7010(B). A completed Multnomah County Land Use Application Form and a check in the amount of \$1,550.00 are attached.

The Final Order for CS 1-97 was approved by the Board of Multnomah County Commissioners on February 3, 1998. AT & T Wireless Services was the original applicant for CS 1-97, and was granted a 2 year period until February 3, 2000 for project development.

American Tower Corporation (ATC) purchased the rights to develop this telecommunications facility from AT & T Wireless Services in late November of 1998. ~~Since that time ATC has proceeded [in] as timely a manner possible, given the complex conditions of approval and sensitive nature of the site, to begin development.~~

In December of 1998, ATC retained Christine Simon and Associates to prepare drawings, landscape plans and conduct testing necessary for development of the site. In late January 1999 geotechnical analysis and soil testing was conducted for the site, which was followed by several months property research and verification of permit status.

In late May of 1999, ATC, satisfied with the results of testing and due diligence, ordered Title Insurance for the proposed Sauvie Island Telecommunication Facility.

In August of 1999, ATC received engineered plans for a 160' tall-galvanized monopole and associated installation equipment for the site, which has been manufactured and delivered to a holding area in the State of Oregon.

During the month of September 1999 ATC reviewed and returned landscaped plans for revision and structural analysis was conducted for design of the tower foundation.

In mid-October of 1999, ATC approved final landscaped drawings and received engineering for the tower foundation.

On December 8, 1999, ATC submitted an application for a Design Review approval of the project and was assigned case number DR 8-99. Tentative approval of the Design Review has been granted by the Planning Director and the appeal period for DR 8-99 will expire on January 24, 2000.

On January 3, 2000, ATC submitted an application for Determination of Substantial Compliance and was assigned case number MC 00-01. We have been received information that ATC was denied affirmative acknowledgement of Substantial Compliance (sic).

Even though ATC has spent more than \$43,000 in pre-permit preparation to develop this site, we understand the 10% test for substantial compliance refers to development dollar amounts expended as a result of approved construction permits. ~~The proposed telecommunication facility will require only one construction permit i.e. a building permit, because on January 17, 2000 ATC determined only 35 cubic yards will be removed for the tower foundation thereby negating the need for a Grading and Erosion Control Permit.~~

On January 25, 2000, the day after the appeal period expires; ATC will submit architectural and engineered drawings and other plans required for an approved building permit for the proposed communication facility. We understand the plans examination process will be conducted by the City of Portland Bureau of Buildings and can take 6 to 8 weeks or longer, which is well past the existing February 3, 2000 project expiration date.

Due to this uncertainty regarding the length of time required by the City of Portland Bureau of Buildings to issue an approved building permit, ATC respectfully requests an extension of 6 months time to complete the proposed Sauvie Island project. This 6-month extension will provide a period of time

necessary to complete the required regulatory process and allow construction of the wireless facility. The requested timeframe would also include any public hearing process required as a result of this application.

Once the applicable permits have been obtained ATC is prepared to commence construction of the site within 14 calendar days.

Staff:

Proposal: The applicant has submitted a Community Service Use application to request a six-month time extension of case file CS 1-97.

Section .7010(B) of the Multnomah County Code states, "Except as provided in MCC .7022(F) and (G), the Approval Authority shall hold a public hearing on each application for a Community Service Use, modification thereof, or time extension." The applicant's request for a time extension of an approved Community Service Use, CS 1-97, is a request that is reviewed through a Community Service application. The Community Service application is reviewed at a public hearing before the Approval Authority as established within the Multnomah County Code.

Case file CS 1-97 is due to expire on February 3, 2000. Failure to obtain approval of the time extension for CS 1-97 will result in the expiration of the approval of CS 1-97 as issued under the Board of County Commissioners (BCC) Final Order on February 3, 1998 for the use of the subject parcel (R#96116-0070) for a cellular communications tower and related facilities.

On January 21, 2000, the applicant submitted a Community Service Use application for the time extension and a Pre-Application Meeting request. A Pre-Application Meeting (PA 0-2) was held on February 2, 2000.

The application, CS 0-2, was deemed complete on February 2, 2000. A public hearing is scheduled for February 16, 2000. A list of exhibits is included within this Staff Report.

The application for the request for the time extension of a Community Service Use is subject to few criteria of the Multnomah County Code. This Staff Report contains the ~~few but~~ relevant criteria applicable to the request filed as CS 0-2. The applicant narrative provides background of the site related activities in terms of prior land use applications, and activities pursued by the applicant to prepare the site for the cellular communications tower and related facilities. Staff has reviewed the previous, related case files for the site at 14443 NW Charlton Road. Staff has also included background information for this case, CS 0-2, within this Staff Comment section.

Staff acknowledges the controversial nature of the issues from CS 1-97. ~~It should be noted that the Staff Planner on CS 1-97 recommended denial of the application.~~ It should also be noted the Hearings Officer and the Board of County Commissioners found the application met the Multnomah County Code and Comprehensive Plan Policies, and subsequently approved the request to locate the cellular communications tower and related facilities on the site identified as 14443 NW Charlton Road.

Staff notes the applicable Code provisions for a cellular communications tower, within the Community Service provisions, have not changed since the approval of CS 1-97 was granted. An application for a cellular tower on this site, for example, if submitted in February 2000, would be subject to review under the same Community Service criteria as the 1997 application, CS 1-97, for the cellular communications tower. One could argue that it could be considered efficient or convenient to approve the applicant's request for a time extension based on this point.

~~The criteria applicable to the case, CS 0-2, are few and non-issue specific. The limited number and type of criteria applicable to the case present some challenges to Staff for analysis and hence establishing findings. Staff notes the applicant's narrative, essentially a timeline from February 1998 to the present, shows a substantial amount of time passed between the Final Board Order for CS 1-97 and submittal of a land use application to the Land Use Planning office. The Final Order was issued February 3, 1998 and the next application for the site, related to the cellular communications tower, was submitted on December 8, 1999. The activities listed in the timeline by the applicant – activities such as preparing drawings, geotechnical analysis, soil testing, and preparing engineered plans – are standard activities related to any given proposed development.~~

Staff finds the applicant's narrative describes no unusual, compelling, or hardship circumstances. None of the cited applicable Code criteria specifically require a determination of unusual, compelling, or hardship circumstances. However, the standard condition of approval for a Community Service Use establishes a 2-year time limit. A request for a time extension is rarely submitted to the Land Use Planning office. It is reasonable to think the standard condition of a 2-year time limit is adequate time to construct a proposed development. The activities described by the applicant's narrative are activities that are to be anticipated as part of a proposed development. ~~As such, the activities are not unusual, or of a hardship circumstance.~~

~~As a comparison, Staff cites the provisions of a Variance application. A Variance application is a request for an exception to a rule (like a setback standard of 30 feet for example). A Variance application involves a hardship or an unusual site circumstance. For example, an unusual or compelling circumstance that may hamper an applicant's ability to meet a deadline for an approved case might be a land use or building permit application that had been appealed and was under review at the Board of County Commissioners, the Land Use Board of Appeals, or other legal proceeding. The timeline for CS 1-97 as established by the Board of County Commissioners Final Board Order, with an expiration of February 3, 2000, is a standard 2-year timeline and provides ample time to accomplish the required land use and building permit applications.~~

APPLICABLE CRITERIA

The staff report cited and addressed the following code provisions as though they were applicable approval criteria. The hearings officer finds, however, that none bear directly on the question of whether an extension of time is appropriate. The hearings officer agrees with the applicant's attorney that the County's variance criteria do not apply to the review of this extension application.

Multnomah County Code

Multiple Use Agriculture (MUA-20)

11.15.2122 Purposes

The purposes of the Multiple Use Agriculture District are to conserve those agricultural lands not suited to full-time commercial farming for diversified or part-time agriculture uses; to encourage the use of non-agricultural lands for other purposes, such as forestry, outdoor recreation, open space, low density residential development and appropriate Conditional Uses, when these uses are shown to be compatible with the natural resource base, the character of the area and the applicable County policies.

The issue of whether the cell tower use is an appropriate conditional use on the subject property was resolved by the County's decision in February 1998. This section does not purport to provide standards by which to determine whether the time frame provided to commence an approved use

should be extended.

11.15.2124 Area Affected

MCC .2122 to .2150 shall apply to those lands designated MUA-20 on the Multnomah County Zoning Map.

The subject parcel is zoned MUA-20 according to the Zoning Maps on file at Multnomah County.

11.15.2132 Conditional Uses

The following uses may be permitted when found by the approval authority to satisfy the applicable ordinance standards:

(A) Community Service Uses pursuant to the provisions of MCC .7005 through .7041;

The cell tower is a community service use that may be allowed as a conditional use in an MUA 10 zone.

Community Service (CS)

11.15.7005 Purpose

MCC .7005 through .7041 provides for the review and approval of the location and development of special uses which, by reason of their public convenience, necessity, unusual character or effect on the neighborhood, may be appropriate in any district, but not suitable for listing within the other sections of this Chapter.

The section provides for the review and approval of special uses. The purpose statement says nothing about whether the section provides for the extension of use permits.

11.15.7010 General Provisions

(B) Except as provided in MCC .7022(F) and (G), the Approval Authority shall hold a public hearing on each application for a Community Service Use, modification thereof, or time extension.

The application for the time extension, identified as case file CS 0-2, was submitted on January 21, 2000. The application is not subject to the provisions of MCC .7022 (F) and (G). A hearing was held on February 16, 2000 regarding the applicant's request for a time extension.

This code section states only that a hearing must be held regarding an application for a time extension. It does not, itself, authorize the granting of a time extension. While it is logical to surmise that there must be a right to a time extension because it is mentioned in this section, the code section creates a public hearing requirement, not a right to a time extension. This fact is evident when one considers the fact that this section is clearly inadequate to authorize a community service use, without the code provisions that say that community uses are allowed as conditional uses and without the standards that determine whether or not the use should be approved.

The fact that a time extension is listed separately from a community service use and from a modification of a community service use indicates that extensions are not the same thing as either of

the other uses. If they were the same, there would be no reason to separately reference the extension as a type of application that requires a public hearing. As each is listed separately, it is logical to conclude that the approval criteria for extension requests will reference the word "extension." The hearings officer, therefore, rejects the applicant's argument that an extension application is an application for approval of a "community service use" governed by the approval criteria of MCC 11.15.7015 and MCC 11.15.7035(C).

The hearings officer also declines to find that MCC 11.15.7035(C) supplies standards and criteria for review of the extension request. MCC 11.15.7035(C) lists the criteria for initial review of the cell tower application. It is illogical for the County to create an extension process that requires the applicant to show compliance with all of the original use approval criteria when it is far easier to make no provision for extensions. In the absence of an extension provision, the applicant must reapply and demonstrate compliance with .7035(C), the same thing the applicant says must be shown in this extension application.

The applicant's attorney argues that MCC 11.15.7015 requires the hearings officer to apply the criteria of MCC .7035 to the extension request.¹ The hearings officer disagrees. MCC 11.15.7015 applies to Community Service uses, not extension requests. MCC .7015 says that "in approving a Community Service use, the approval authority shall find that the proposal meets the following approval criteria, except for transmission towers, which shall meet the approval criteria of MCC .7035." This is clearly a provision that relates to the approval of a community service in the first place, not to an extension application. A request for an extension, plainly, is not a request for a use approval but a request simply to extend the period of time a prior use approval is valid.

Furthermore, it is clear that the applicant does not view the original approval criteria as applicable review criteria. What the applicant is really arguing is that only those provisions of MCC .7035 (C) that have changed since the original cell tower application was filed serve as approval criteria for the extension request. As no aspect of the approval criteria has changed, the applicant is arguing that it is entitled to an extension as a matter of right. The applicant's attorney bases this argument on the premise that the hearings officer is bound by the findings and conclusions of law made in 1998 and must approve the extension request. If the hearings officer were to accept the applicant's argument, it would be possible for the applicant to continue to return to the hearings process as long as the applicant desires until the County changes MCC .7035. It seems odd that the County would require a hearing, rather than an administrative review, prior to the approval of such a mechanical and non-discretionary review. It seems reasonable to conclude that the County would not have required the expense of a hearing unless there was something of substance to consider when making the extension decision. This supports the hearings officer's conclusion that the County failed to adopt criteria to govern extensions rather than intended that they be approved after a review of the original approval criteria.

The hearings officer also finds that the County's code provides no guidance on the length of a continuance. This is one of the most basic questions that must be answered when an extension is requested. The applicant's analysis does not address this issue.

The applicant's argument regarding extensions is, essentially, an argument that the County has adopted a provision that says that applications for extensions shall be granted if the law in effect at the time of approval is the same or similar to the law in effect at the time of extension. While the applicant's attorney's argument sets forth one reasonable approach that the County could have adopted in its code, it is not the only reasonable approach to deciding whether to grant an extension request. More

¹ Actually, the applicant's attorney does not want the hearings officer to apply these criteria as he argues that she is forbidden from doing that by the legal theory of law of the case and issue and claim preclusion.

importantly, it is not an approach that has been adopted by Multnomah County in its code. By way of example, the approach taken by Ms. Sears might well be a reasonable approach. Some governmental entities require applicants who apply for extensions to establish good reasons for having failed to comply with the permit deadline. Others allow extensions as of right for a limited number of times and for a maximum amount of time. The hearings officer hopes that the County will provide standards to govern the extension question in its pending revision of its procedures ordinance.

(C) The approval of a Community Service Use shall expire two years from the date of issuance of the Board Order in the matter, or two years from the date of final resolution of subsequent appeals, unless:

*** * ***

(2) The Approval Authority establishes an expiration date in excess of the two year period, or

The applicant's attorney argues that this section authorizes the approval of a time extension. This section clearly authorizes the "Approval Authority" to establish an expiration date in excess of two years when the permit is initially issued. This fact is evident from the fact that as the section speaks to establishing, rather than to revising or extending an expiration date. Even if this section is read to say that the hearings officer may extend an expiration date established by the original approval authority, the Board of Commissioners, the section provides no approval standards or criteria.

(3) The Planning Director determines that substantial construction or development has taken place.

The Director has determined that substantial construction or development has not taken place in an earlier review.

(D) A Community Service approval shall be for the specific use or uses approved together with the limitations or conditions as determined by the approval authority. Any change of use or modification of limitations or conditions shall be subject to approval authority approval after a public hearing.

The applicant's attorney argues this section also authorizes a time extension. An expiration date may or may not be listed as a condition of approval in a community service permit. MCC 11.15.7010 sets a two-year expiration date for permits that need not be restated in the permit. Expiration dates are only required if a period in excess of two years is established in the decision. In this case, in 1997 the hearings officer reviewing the cell tower application elected to include the two year expiration date as a condition of approval. This means that this section may authorize a time extension in this case, but not in all cases, as expiration dates will not necessarily be found in other decisions. The fact that section (B), above, refers to modifications and extensions as separate actions points to a different conclusion. Regardless, this section says nothing about what standards must be used to determine whether to modify the expiration date.

(E) In granting approval of a Community Service Use, the approval authority may attach limitations or conditions to the development, operation or maintenance of such use including but not limited to setbacks, screening and landscaping . . . and expiration dates of approval.

This section applies when a hearings officer grants approval of a Community Service Use. It does not apply after a use approval is granted. As found earlier, an extension application is not an application for approval of a community service use. The fact that expiration dates may be attached to approvals does not mean that the hearings officer has the authority to change an expiration date already established by law or in an existing permit.

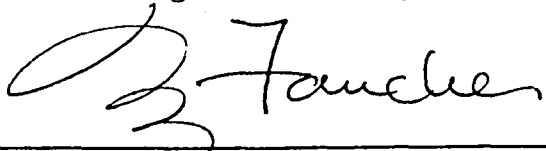
11.15.7020 Uses

(A) Except as otherwise provided in MCC 11.15.2008 through .2012 and MCC 11.15.2048 through .2050, the following Community Service Uses and those of a similar nature, may be permitted in any district when approved at a public hearing by the approval authority.

(15)Radio and television transmission towers.

This section confirms that the use previously approved for the subject property is a use that may be approved as a community service use. It does not assist the hearings officer in determining whether to grant approval of the application for extension.

Dated and signed this 16th day of March, 2000.



Liz Fancher, Hearings Officer

Appeal to the Board of County Commissioners:

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An Appeal requires a completed "Notice of Review" for and a fee of \$500.00 plus a \$3.50 - per- minute charge for a transcript of the initial hearing(s). [ref. MCC 11.15.8260(A)(1) and MCC 11.15.9020(B)] Instructions and forms are available at the County Planning Office at 1600 SE 190th Ave., (in Gresham) or you may call 248-3043, for additional instructions.

Case File: CS 0-2

Location:

14443 NW Charlton Road.
T2N, R1W, Section 16, Tax Lot 7 at 3.50 acre.
R#96116-0070.

Application Timeline:

Pre-Application Conference, PA 0-2: February 2, 2000.
Application received with full fees: January 21, 2000.
Application incomplete letter mailed: NA.
Determination that application is complete and letter mailed: February 2, 2000.
Begin "120 day timeline" on February 2, 2000.
Notice of a Public Hearing (mailed): February 4, 2000.
Staff Report available: February 9, 2000.
Public Hearing before Hearings Officer: February 16, 2000. **Day 14.**
Record Closed for New Evidence: February 23, 2000.
Last Day for Written Arguments: March 1, 2000.
Decision Signed: March 16, 2000.

List of Exhibits:

List A: Staff/ Applicant Exhibits:

1. Applicant vicinity map (enlarged copy).
2. Applicant aerial photo, labeled Exhibit 6, from case file CS 1-97.
3. Board of County Commissioner's Final Order for CS 1-97, dated February 3, 1998.
4. Applicant site plan sheet C1 (reduced copy).
5. Applicant detail site plan sheet A1 (reduced copy).
6. Cell tower elevation drawings, sheet A2 (reduced copy).
7. Cell tower details, sheet A3 (reduced copy).

List B: Notification Information:

1. "Complete application" Letter, February 2, 2000, 1 page.
2. Notice of Hearing, February 4, 2000, 4 pages.

List C: Multnomah County Documents

1. Staff Report – February 9, 2000

List H: Documents Submitted at Public Hearing & Prior to Close of Record

- H-1 Exhibits 1 – 4, Neighborhood Meeting & Site Plan – October 1996.
- H-2 February 4, 2000 letter from Thomas Highland to Tricia Sears.
- H-3 February 8, 2000 letter from Don Larson of American Tower Corporation to Tricia Sears.
- H-4 February 16, 2000 letter from Kelly Hepner to Department of Land Use Planning
- H-5 February 16, 2000 facsimile transmittal to Tricia Sears with February 16, 2000 letter from David and Teresa Sprando and Michael and Stacy Marshman to Multnomah County.
- H-6 February 11, 2000 letter from Adrienne Keith to Tricia Sears.
- H-7 CS-02 Sauvie Island Cell Tower, Folder of Information from Adrienne Keith.
- H-8 Telecopier Message Sheet from Paul Norr to Tricia R. Sears dated February 16, 2000 and letter to Liz Fancher from Paul Norr dated February 16, 2000.
- H-9 Letter dated February 13, 2000 from Julie Cieloha to Hearings Officer.
- H-10 Letter dated February 12, 2000 from Jim Vann to Hearings Officer.
- H-11 Letter dated January 26, 1998 from Shirley Larson to Multnomah County Commission.
- H-12 Letter dated February 14, 2000 from Tom E. Gibbons to Hearings Officer.
- H-13 Memorandum dated February 18, 2000 from Tricia Sears to Liz Fancher with 3 attachments.
- H-14 Memorandum dated February 23, 2000 from Tricia Sears to Liz Fancher.
- H-15 Letter from Paul Norr to Liz Fancher dated February 23, 2000 with attachments (record of CS 1-97).
- H-16 Letter from Paul Norr to Liz Fancher dated March 1, 2000.