

**BEFORE THE LAND USE HEARINGS OFFICER  
OF CLACKAMAS COUNTY, OREGON**

Regarding an Application for Siting a Wireless	)	<b>Case File No.</b>
Telecommunications Facility and Adjustment to	)	<b>Z0436-15-AAC</b>
Setback Requirements.	)	<b>(Leslie Enterprises)</b>

**A. SUMMARY**

1. The applicant is Verizon Wireless. The owner is Leslie Enterprises & Property LLC. The application is to install a monopole cellular phone tower.

2. The subject property is located at 13580 SE Pheasant Court, Milwaukie, OR 97222. The legal description is T2S, R2E, Section 05DB, Tax Lot 400, W.M. The subject property is approximately 4.5 acres and is zoned GI – General Industrial.

3. On January 21, 2016, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application.

**B. HEARING AND RECORD HIGHLIGHTS**

1. The Hearings Officer received testimony at the public hearing about this application on January 21, 2016. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the staff report, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.

2. At the hearing, county planner Scott Hoelscher discussed the staff report and recommended approval of the cellular tower and related adjustment.

3. The applicant’s representative, Christine Smith from ACOM Consulting, testified in favor of the application.

4. No one testified in opposition to the application.

5. At the conclusion of the public hearing, the Hearings Officer closed the record.

## C. DISCUSSION

### 1. Facts

The subject property is located at 13580 SE Pheasant Court in Milwaukie on the north side of Highway 224 about 2500 feet west of the I-205 interchange. The property is approximately 4.5 acres and zoned GI – General Industrial. The property is currently occupied by Norlift of Oregon, Inc. (Norlift), a supplier of warehousing equipment and products. The main Norlift building is located on the southern portion of the property near Highway 224. A smaller building is located near the western property line. The proposed 75-foot monopole would be located in the northeast corner of the property, 46 feet from the east property line and 109 feet from the north property line. As discussed later, the applicant seeks an adjustment to the setback requirements to locate the monopole closer to the east property line than would otherwise be allowed. The surrounding area is a mix of industrial, office, and commercial uses.

### 2. Analysis

The application is subject to Clackamas County Zoning and Development Ordinance (ZDO) chapter 835 concerning wireless communications facilities and chapter 1000 regarding development standards. The staff report does a thorough job of analyzing the approval criteria and explaining why the approval criteria are satisfied. As there was no opposition to the application, it would be waste of the County's money and resources to review and repeat all of the findings in the staff report. Therefore, I adopt and incorporate the findings in the staff report in this decision, except as discussed further.

ZDO 835.09(C)(3) provides that setbacks for wireless communication towers must be set back at least the height of the tower from all property lines.<sup>1</sup> As discussed earlier, although the proposed tower would meet setback requirements to the north, south, and west, the proposal seeks to site the tower only 46 feet from the east property line, which is less than the 75-foot setback required by ZDO 835.09(C)(3). ZDO 835.11 provides:

“A. Adjustments to the standards of this section may be approved by the Hearings Officer. The Hearings Officer may grant an

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<sup>1</sup> ZDO 835.09(C)(3) provides: “Setbacks: Must satisfy setbacks of the zone. Additionally, the wireless telecommunication tower shall be set back a distance not less than its height from all property lines.”

adjustment under either of the following circumstances:

“\* \* \* \* \*

“2. The Hearings Officer may grant an adjustment to a standard when the proposed adjustment would utilize existing site characteristics to minimize demonstrated or potential impacts on the use of surrounding properties. For the purposes of this subsection, site characteristics shall include, but need not be limited to, those identified in Subsection 1203.01(B). Applicants for an adjustment under this provision must demonstrate that the adjustment will result in a lower level of impact on surrounding properties than would be generated if the standard were not adjusted. In considering the requested adjustment, the Hearings Officer may consider the following:

- “a. Visual impacts;
- “b. Impacts on view;
- “c. Impacts on property values; and
- “d. Other impacts that the Hearings Officer finds can be mitigated by an adjustment so that greater compliance with Subsection 1203.01(D) occurs.”

To allow an adjustment under this section, an applicant must demonstrate that the proposed adjustment “would utilize site characteristics to minimize demonstrated or potential impacts on the use of surrounding properties.” The applicant must also demonstrate that “the adjustment will result in a lower level of impact on surrounding properties than would be generated if the standard were not adjusted.” This section references ZDO 1203.01(B), which lists certain site characteristics to be considered when determining whether a proposed conditional use is suitable for the proposed site, including “size, shape, location, topography, existence of improvements, and natural features.”

In the present case, this is a somewhat difficult determination to make because there does not appear to be much if any anticipated impacts from the proposed tower. It is difficult to reduce impacts when there are no impacts to begin with. Although the main reason for locating the tower at the proposed location appears to be compatibility with the use of the subject property, there is a stand of taller trees in the northeast corner that would help screen the tower. The abutting properties to the north and east contain the rear

of commercial and industrial uses and would appear not be affected at all by the proposed tower.<sup>2</sup> There is no evidence that the reduced setback would have any adverse effect on the adjoining properties. While there does not appear to be much impact to other properties, locating the tower in the northeast corner of the property would move the tower farther away from Highway 224 where it would be more visible to more people. The topography of the existing site and the natural feature of the existing trees would help make the tower less visible to surrounding properties. Given that there is no opposition to the application and that there does not appear to be any adverse effect upon the properties to the north and east, I conclude that the application demonstrates that the requested adjustment would minimize demonstrated or potential impacts on the use of surrounding properties and will result in a lower level of impact on surrounding properties because visual impacts and impacts on view will be reduced pursuant to ZDO 835.11(A)(2)(a & b).<sup>3</sup> Therefore, an adjustment to the setback requirements of ZDO 835.09(C)(3) is granted.

#### **D. DECISION**

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **APPROVES** application Z0436-15-AAC, with the following conditions of approval.

#### **E. CONDITIONS OF APPROVAL**

1. Clackamas County Department of Transportation and Development, Building Codes Division, approval of a building permit and related, electrical, mechanical permits, if applicable, are required for this facility.
2. The 75-foot monopole shall be setback a minimum of 75 feet from the north, south, and west property lines and a minimum of 46 feet from the east property line.
3. No lighting or marking shall be placed on the tower except as required by state and/or federal regulations.

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<sup>2</sup> As discussed, no adjacent property owners object to the application.

<sup>3</sup> The staff report discusses an earlier decision from a different Hearings Officer that allowed an adjustment under the same criterion which allowed the applicant “to focus on the desired subject property itself” rather than reducing impacts to surrounding properties. Because I find that impacts to surrounding properties will be reduced, I need not and do not consider whether an adjustment may be granted based solely on the benefit to the subject property.

4. The monopole shall not exceed 75-feet above ground level.
5. The applicant shall obtain a Utility Placement Permit prior to commencement of utility work within the County right-of-way.
6. The applicant shall remove the facility from the site when the applicant or any other successor in interest ceases to use it as a telecommunications facility.
7. The telecommunications facility shall be located within a fenced area that is enclosed on all sides. The enclosure must be at least six feet tall and sight obscuring.
8. The telecommunications facility shall be designed and built to accommodate collocation for two additional carriers and the equipment identified in Subsection 835.08(B) of the Clackamas County Zoning and Development Ordinance.
9. All construction shall comply with the relevant requirements of the Oregon Structural Specialty Code as administered by the DTD, Building Codes Division.
10. Prior to the issuance of a building permit the applicant shall file FAA Form 7460-1 Notice of Proposed Construction or Alteration with the FAA and the Oregon Department of Aviation (ODA). A copy of the form shall be submitted to this file.
11. Maintenance of the leased area is the responsibility of the owner/operator of the wireless communication facility. The owner/operator shall prevent the facility from entering into a state of disrepair due to negligence, vandalism, natural hazard, or any other source.
12. This permit is approved for the specific use described in the application to the extent it is consistent with the conditions of approval.
13. Prior to the issuance of a building permit the applicant shall submit a landscape plan to the Clackamas County Planning and Zoning Division indicating the number, type, and location of landscape materials to surround the 34'4" x 20'-7" lease area.

14. This permit is granted subject to the conditions of approval. Non-compliance with any of these conditions constitutes a violation of this permit and shall be cause for revoking this permit.
15. This approval shall expire in the event the approval is not implemented within four (4) years of the final written decision. This approval will be considered implemented when all necessary permits for development have been secured.
16. The federal Endangered Species Act (ESA) is not a criterion for approval of this application. The County has reviewed the approval standards in light of the requirements of the ESA and believes that the criteria for approval are consistent with the terms of the ESA and has submitted the Development Ordinance for consideration for a "4(d)" programmatic limitation. However, the analysis included in this report does not include an evaluation by the County of the applications for consistency with the ESA nor does the report reach any conclusions regarding that federal law. The applicant is responsible for designing, construction, operation, and maintaining the activities allowed by an approval of this application in a manner that ensures compliance with the ESA. Any question concerning this issue should be directed to the applicant, its consultants, and the federal agencies responsible for administration and enforcement of the ESA for the affected species.

DATED this 16<sup>th</sup> day of February, 2016.



Fred Wilson  
Clackamas County Hearings Officer

### **ENDANGERED SPECIES ACT NOTICE**

The federal Endangered Species Act (ESA) is not a criterion for approval of this application. The County has reviewed the approval standards in light of the requirements of the ESA, believes that the criteria for approval are consistent with the terms of the ESA and has submitted the Development Ordinances for consideration for a "4(d)" programmatic limitation. However, the analysis included in this decision does not include

an evaluation by the County of the applications for consistency with the ESA nor does the decision reach any conclusions concerning that federal law. The applicant are responsible for designing, constructing, operating and maintaining the activities allowed by an approval of this application in a manner that ensures compliance with the ESA. Any question concerning this issue should be directed to the applicant, their consultants and the federal agencies responsible for administration and enforcement of the ESA for the affected species.

### **APPEAL RIGHTS**

ZDO 1307.10(F) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).