



CITY OF PORTLAND

Office of City Auditor LaVonne Griffin-Valade

Hearings Office

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DECISION OF THE HEARINGS OFFICER

I. GENERAL INFORMATION

File No.: LU 11-125536 CU AD (HO 4110025)

Applicants: Galen E. and Clay E. Tyler, listed property owners
Mt. Scott Fuel
6904 SE Foster Road
Portland, OR 97206-4548

Verizon Wireless, lessee
5430 NE 122nd Avenue
Portland, OR 97230

Applicants' Representative: Laura Hopfer
Ridge Communications Inc.
252 A Avenue, Suite 200
Lake Oswego, OR 97034

Hearings Officer: Gregory J. Frank

Bureau of Development Services (BDS) Staff Representative: Sylvia Cate

Site Address: 6904 SE Foster Road

Legal Description: TL 12400 3.85 ACRES LAND & IMPS SEE R335883 (R992170511),
SECTION 17 1S 2E

Tax Account No.: R992170510

State ID No.: 1S2E17BA 12400

Quarter Section: 3537

Neighborhood: Mt. Scott-Arleta

Business District: Foster Area

District Coalition: Southeast Uplift

Plan District: None

Zoning: CGb: General Commercial with a Buffer overlay

Land Use Review: Type III, Conditional Use and Adjustment

BDS Staff Recommendation to Hearings Officer: Approval with conditions

Public Hearing: The hearing was opened at 8:59 a.m. on October 3, 2011, in Room 2500A, 1900 SW 4th Avenue, Portland, Oregon, and closed at 11:35 a.m. The record was held open until 4:30 p.m. on October 10, 2011 for new written evidence and until 4:30 p.m. on October 17, 2011 for Applicants' final argument. The record was closed at that time.

Testified at the Hearing:

Sylvia Cate, 1900 SW 4th Avenue, Suite 5000, Portland, OR 97201
Laura Hopfer, 5775 Jean Road, Suite 210, Lake Oswego, OR 97035
Neal Sutton, 4542 SE 60th Avenue, Portland, OR 97206
Marcel Hermans, 6910 SE Raymond Court, Portland, OR 97206
Shannon O'Connor, 4934 SE 67th Avenue, Portland, OR 97206
Phyllis Shelton, 7033 SE Mitchell Street, Portland, OR 97206
Courtney Erskine, 4930 SE 66th Avenue, Portland, OR 97206
Walt Nichols, 7519 SE Harold Street, Portland, OR 97206
Matt Cooper, 7030 SE Raymond Court, Portland, OR 97206
Chris Hill, 7120 SE Raymond Court, Portland, OR 97206
Liz McKeever, 4904 SE 67th Avenue, Portland, OR 97206
Eric Joy, 5016 SE 68th Avenue, Portland, OR 97206
Max Trisler, 4904 SE 67th Avenue, Portland, OR 97206

Proposal: Verizon Wireless proposes to construct a 45-foot tall monopole for a wireless telecommunications facility on real property generally described as 6904 SE Foster Road (the "Site"). The proposal includes up to a total of 12 antennas hosted on the monopole, with an initial start of nine antennas. A fenced accessory equipment compound is proposed to be located at grade adjacent to the monopole, with electrical equipment cabinets located on a concrete slab, and an emergency generator included within the equipment area (collectively the wireless associated improvements shall hereafter be referred as the "Facility").

The Applicants also request an Adjustment to waive the required landscaping buffer due to development and conditions on the Site which will partially screen the Facility from view. The Applicants note that the Site, which is used by a commercial business that stockpiles and sells crushed rock, bark dust and similar materials, already has an existing 6-foot high site-obscuring

fence and concrete wall inside the fencing along the south, east and west property lines, and suggests that the existing building will screen the facility from views.

Ordinarily, the proposed monopole would be allowed by right, as it is in a commercial zone, meets the maximum height allowed in the commercial zone and is more than 50-feet away from a residential zone. However, the proposed monopole is within 2,000 feet of an existing, 45-foot tall monopole. Verizon contends that it is not able to collocate on that existing monopole, and thus proposes a new facility.

Relevant Approval Criteria:

In order to be approved, this proposal must comply with the approval criteria of Title 33, Portland Zoning Code. The applicable approval criteria are:

- 33.815.225.C.1 through 6, Conditional Use approval criteria
- 33.274.040.C, Mandatory Development Standards
- 33.805.040.A through F, Adjustment

II. ANALYSIS

Site and Vicinity: The Site is a parcel of a larger ownership comprising the Mt. Scott Fuel Company retail sales location for crushed rock and bulk landscaping materials. The Site is approximately 167,706 square feet in area and is developed with a large industrial building surrounded by bulk piles of landscaping materials such as sand, gravel, bark dust, and similar. The Site has frontage on SE Foster, as well as minor frontage areas on SE Raymond Street and SE 68th Avenue along the southerly edge of the Site. The Site is one of many commercial uses along SE Foster Road, which fronts the Site along its northerly boundary. To the east are additional lots zoned General Commercial and developed with commercial uses. To the west and south of the Site are lots and parcels zoned residential, primarily R2.5a, with an area catercorner from the southwest edge of the Site zoned R5a. These areas are developed with residential uses. A large Buffer overlay zone, approximately 80 feet deep, is applied along the southern boundary of the Site to provide additional buffering and separation from adjacent residential uses.

Zoning: The Site is zoned CGb, General Commercial with a Buffer overlay.

The *General Commercial* (CG) zone is intended to allow auto-accommodating commercial development in areas already predominantly built in this manner and in most newer commercial areas. The zone allows a full range of retail and service businesses with a local or regional market. Industrial uses are allowed but are limited in size to avoid adverse effects different in kind or amount than commercial uses and to ensure that they do not dominate the character of the commercial area. Development is expected to be generally auto-accommodating, except where the site is adjacent to a transit street or in a Pedestrian District. The zone's development standards promote attractive development, an open and pleasant street appearance, and compatibility with adjacent residential areas. Development is intended to be aesthetically pleasing for motorists, transit users, pedestrians, and the businesses themselves.

The *Buffer overlay zone* requires additional buffering between nonresidential and residential zones. It is used when the base zone standards do not provide adequate separation between residential and nonresidential uses. The separation is achieved by restricting motor vehicle access, increasing setbacks, requiring additional landscaping, restricting signs, and in some cases by requiring additional information and proof of mitigation for uses that may cause off-site impacts and nuisances.

Land Use History: City records indicate no prior land use reviews. A required Pre-Application Conference, PC 10-194550, was held on December 22, 2010, the summary notes from that Conference are contained in Exhibit G 3. During the conference, the Applicants were encouraged to 'flip' the compound configuration in order to place the monopole toward the interior of the Site and further away from adjacent homes. The plans submitted for this review reflect that BDS staff recommendation.

Agency Review: A "Request for Response" was mailed August 12, 2011. The following bureaus have responded with no issues or concerns. Any additional comments from agencies that are relevant to the approval criteria are included in the findings below. Additional agency comments specific to requirements at time of building permit review are found in the E Exhibits of this decision.

- Bureau of Environmental Services (BES) [Exhibit E.1]
- Bureau of Transportation (PBOT) Engineering [Exhibit E.2]
- Water Bureau [Exhibit E.3]
- Fire Bureau [Exhibit E.4]
- Site Development Section of BDS [Exhibit E.5]
- Bureau of Parks-Forestry Division [Exhibit E.6]
- Life Safety Section of BDS [Exhibit E.7]

Neighborhood Review: A Notice of Proposal in Your Neighborhood was mailed on September 9, 2011. BDS staff received several phone calls and seven written responses from the notified property owners in response to the proposal prior to the scheduled hearing.

BDS noted that responses submitted to it prior to the public hearing raised issues and concerns that fell into two general categories: notification concerns and concerns about the proposal itself.

Notification concerns

BDS Staff Comments: "The city mailed out a Notice of Hearing on September 9, 2011 [Exhibit D-6], 23 days in advance of the October 3rd public hearing. Several phone calls and emails were received noting that the contact information for the Mt. Scott-Arleta Neighborhood Association was incorrect. The contact name and number for the applicable District Coalition [SEUL] was also included on the notice and was accurate, as well as the assigned planner's name and contact information. The Office of Neighborhood Involvement provides this information to the Bureau of

Development Services, and BDS updates mailing lists once the updated information is received. After an investigation by BDS IT staff and the Notification Clerk, it was determined that staff had generated the template for the Notice of Hearing shortly before the new contact information had been entered into the BDS database.

Subsequently, BDS mailed out a correction to the original notice with the updated Neighborhood Association contact information on September 14, 2011 [Exhibit D-7]. Multiple requests were made to staff by neighbors to reschedule the hearing based on the outdated neighborhood contact information. The applicant's representative indicated that because the Site had been properly posted and timely notification given, a new time certain was neither necessary nor required."

Hearings Officer Comments: The Hearings Officer finds Notice of the Hearing was adequate. The Hearings Officer finds that two Notices of Hearing were sent (Exhibits H.2 and H.3), the public hearing was well attended and the record was held open for an additional seven days for the submission of written evidence. The Hearings Officer finds the Mt. Scott-Arleta Neighborhood Association submitted extensive comments into the public record (Exhibit H.15a).

Concerns regarding the proposal

Additional written comments were received by a number of notified and concerned neighbors [All comments can be found in Exhibits F.1 through F.7]. Issues raised relating to relevant approval criteria shall be discussed by the Hearings Officer in the findings below.

ZONING CODE APPROVAL CRITERIA

Preliminary Findings:

The Applicants, in Exhibit H.28 state the following:

"It should be noted that because the proposed Verizon Wireless facility is in compliance with federal rules, it is also in compliance with local regulations concerning RF exposure. The following is the complete text of 47 U.S.C. §332(c)(7)(B)(iv): *"No State or local government or instrumentality thereof may regulate the placement, construction, or modification of personal wireless services facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."*

The Applicants provided no additional evidence or argument related to the section of 47 U.S.C. quoted above. The Hearings Officer was uncertain if the Applicants were attempting to argue that the quoted section of 47 U.S.C. prohibited the City from enforcing its zoning code in any manner whatsoever or if the Applicants were focusing on a particular approval criterion found in the zoning code that is precluded by Section U.S.C. Without more specificity and direction, the Hearings Officer is unable to effectively respond.

The Hearings Officer would note that the Applicants provided insufficient evidence (see findings for PCC 33.815.225 C.1) to allow the Hearings Officer to ascertain which approval criteria should be applied in this case. The Hearings Officer finds that the Applicants' burden, under PCC 33.815.225, is to provide evidence that a facility is operating at less than, or in the alternative more than, 1,000 watts ERP. The reason for the Applicants to provide such information is simply to determine which approval criterion (PCC 33.815.225 C or D) should be applied and reviewed. The reason for the Applicants providing such information is not to regulate the placement, construction, or modification of its wireless services facility on the basis of environmental effects of radio frequency emissions.

33.815.225 Radio Frequency Transmission Facilities

These approval criteria allow Radio Frequency Transmission Facilities in locations where there are few impacts on nearby properties. The approval criteria are:

- C. Approval criteria for facilities operating at 1,000 watts ERP or less, proposing to locate on a tower in a C or EX zone more than 50 feet from an R zone:
 - 1. The applicant must prove that a tower that is taller than the base zone height standard allows or is within 2,000 feet of another tower is the only feasible way to provide the service, including documentation as to why the proposed facility cannot feasibly be located in a right-of-way;

Findings:

Applicability of 33.815.225 C.1:

Generally: BDS staff applied Portland City Code ("PCC") 33.815.225 C as the Conditional Use approval criterion for this application (Exhibit H.6). BDS staff indicated, in Exhibit H.6, that this application involved a facility "operating at 1,000 watts ERP or less." Numerous opponents of the application argued that PCC 33.815.225 D is the applicable approval criterion and not PCC 33.815.225 C because the "facility" operates at more than 1,000 watts ERP (See, as examples of this position Exhibits H.15a, H.18a and H.25). In addition, at least one opponent of the application argued that evidence supplied by Applicants in support of the facility operating at less than 1,000 watts ERP or less was unreliable (Exhibit H.24).

Interpretation of "facilities operating at 1,000 watts ERP or less": The Applicants/BDS staff and Opponents disagree as to the correct code interpretation of "facilities operating at 1,000 watts ERP or less." The disagreement can, in simplified terms, be described as whether (or not) the PCC 33.815.225 C quoted language anticipates wattage emissions from a single antenna or wattage from all facility antennae be aggregated. The Applicants' estimate of 759 watts per antenna is clearly below the 1,000 watt PCC 33.815.225 C.1 threshold. The Opponents' estimate (759 watts per antenna x 9 antennae) of 6,831 is clearly above the 1,000 PCC 33.815.225 C.1 threshold.

The Hearings Officer finds that the Applicants did not supply, in writing or through testimony at the public hearing, discussion of why its single antenna interpretation of PCC 33.815.225 C.1 is the correct interpretation. The Hearings Officer notes that the Applicants did provide evidence related to the per antenna wattage estimate (Exhibits A.2, A.3, A.4, H.28a and H.28b). The Hearings Officer will discuss the credibility of the Applicants' evidence in the findings below.

The Opponents' argument that "facilities operating at 1,000 watts ERP or less" is most concisely set forth in Exhibit H.15 and Exhibit H.18a. The Hearings Officer quotes selected sections from Exhibit H.18a below:

" 'Radio Frequency Transmission Facilities' has no definition in the code, but the use category is described at 33.920.540. Sub C says: 'Examples include broadcast towers, communication towers, and point to point microwave towers.' Those examples all refer to the whole unit, not to a single antenna, or a single antenna. Some of the examples listed are in fact required to have multiple antennas under 33.274.040.

The plain language meaning of the word 'facility' also supports that interpretation. The Hatfield and Dawson report distinguishes between the facility and the antennas: 'the proposed wireless facility will have a new 45' monopole, with nine panel antennas...'

The BDS report makes similar distinctions between the facility and the antennas in the Staff Report conclusion: 'The applicant requests...a wireless telecommunications facility that...will include up to a total of 12 antennas...'

The Code makes similar distinctions between the facility and the antennas: 'towers that support facilities,' 33.274.040(C)(2); 'tower accommodating a Radio Frequency Transmission Facility...must...support at least two additional transmitter/antenna systems,' 33.274040 (C)(2).

Because the initial start of the proposed project involves 9 antennas running up to 759 W each, the facility is well over the 1000 W limit. The Registration Form at A-4 lists the power as less than 10,000 W, rather than as less than 1000W.

The facility will operate at more than 1000 W and must meet the criteria of 33.815.225(D)."

BDS staff provided an open-record submission which did discuss the "facilities operating at 1,000 watts ERP or less" issue (Exhibit H. 26). The Hearings Officer quotes selected sections of Exhibit H.26 below:

"The opponents are incorrect in how they have calculated and applied the calculated ERP for the facility.

First, it is important to note that the FCC establishes the maximum allowed ERP values of all Radio Frequency Transmission facilities, whether they are cellular, PCS, Broadband, FM Radio, AM Radio, Digital Broadcast Television and so on.

PCC Title 33, Zoning Code, defines ERP [33.910, page 9]
as:

Effective Radiated Power (ERP). A calculation of the amount of power emitted from a radio frequency antenna. The intent of this zoning definition is to determine the ERP of a wireless facility based on the power emitted by one antenna, and the case of antennas allowed by the FCC to transmit with multiple channels, the power emitted by one channel of the antenna. This is consistent with the FCC's regulations establishing limits based on one channel of a transmitting antenna. Therefore, based on this calculation the proposed Verizon facility will operate below 1,000 watts ERP and therefore qualifies for the Conditional Use approval criteria at 33.815.225.C.1 through 6.

It is important to not two additional aspects pertaining to ERP. As noted in the materials attached to this Memo, cellular and PCS wireless facilities are typically configured with three antenna sectors, consisting of one transmitting antenna and two receiving antennas. Receiving antennas do not transmit radio frequencies, and therefore ERP calculations do not apply to those antennas. This fact alone undermines the opponents contention that the ERP must be multiplied by the number of antennas the proposed Verizon facility will host.

In addition, the ERP calculation is based, as noted, on one antenna [if it is a single channel antenna] or one channel of that antenna if the wireless carrier holds a license to deploy multiple channels through their network. Because these individual 'base stations' in a wireless carrier's network are configured to work on line-of-sight with other nearby base stations in the network, the three antenna sectors are oriented in specific directions so that each antenna sector is transmitting a signal in the right direction. Each of the three sectors faces a different direction, and therefore the ERP power from one sector's transmitting antenna does not cumulatively add additional ERP power to either other sector's antennas. In other words, the FCC maximum ERP limits are based on one antenna/ one channel, **not all** of the antennas/channels of the facility.

This maximum ERP limit is an extremely important distinction to understand, because the maximum limit it is based on one antenna/one channel; however, when a facility is in operation and sending signal via all transmitting antennas of the facility and utilizing all of the channels available, the total ERP [power x # of transmit antennas x # of channels] will result in a mathematical value greater than 1,000. However, this total in no way indicates that the facility itself is exceeding the FCC maximum of 1,000 watts. Because of the differences in the possible total ERP values of any facility, the zoning code utilizes the FCC's maximum ERP limit as the threshold to determine which regulations in 33.274 are applicable, as well as which approval criteria apply to a specific proposal. Therefore, Staff concludes that based on

the NIER report [Exhibit A-3] the facility will operate below 1, 000 watts ER consistent with the definition of same in PCC Title 33."

The Hearings Officer's findings below takes note of PCC 33.700.070 A which states: "Literal readings of the code language will be used. Regulations are no more or less strict than as stated." The Hearings Officer's findings also take note of PCC 33.700.070 D which states that "words used in the zoning code have their dictionary meaning unless they are listed in Chapter 33.910, Definitions. Words listed in the Definitions chapter have the specific meaning stated, unless the context clearly indicates another meaning."

PCC 33.910 defines "Effective Radiated Power (ERP)" as "a calculation of the amount of power emitted from a radio frequency antenna." ERP is defined in 47 CFR Ch. 1 (10-1-04 Edition) as "(in a given direction) the product of the power supplied to the antenna and its gain relative to a half - wave dipole in a given direction." The term "facilities" is not defined in PCC so the dictionary definition shall be used. Facility is defined, in the *Merriam-Webster Online Dictionary* as "something that is built, installed, or established to serve a particular purpose." Antenna is defined, in the *Merriam-Webster Online Dictionary* as "a usually metallic device (as a rod or wire) for radiating or receiving radio waves."

The Hearings Officer finds the language of PCC 33.815.225 C ("facilities operating at 1,000 watts ERP or less...") is subject to two plausible interpretations. The Hearings Officer finds the first plausible interpretation, the one offered by the Opponents (Exhibits H.15a and H.18a), is that the total ERP watts from all antennas are to be added together in order to determine whether the approval criteria set forth in PCC 33.815.225 C applies. This interpretation places its primary emphasis on the word "facilities." The Hearings Officer finds the second plausible interpretation, the one proffered by BDS staff (Exhibit H.26), is that the 1,000 watt threshold is to be applied to one antenna/one channel and "not all of the antennas/channels of the facility." This interpretation places its primary emphasis on the definition of ERP.

The Oregon Supreme Court, in *PGE v. BOLI*, 317 Or 606 (1993) provides the seminal legal decision regarding interpreting a statute or otherwise codified law (in this case the Portland City Code). The Court, in *PGE v. BOLI*, directs those who interpret laws to first consider the text of the code and if that language is clear then the inquiry is at an end; the language is clear and unambiguous. If some ambiguity remains, after considering the text of the code, then a consideration of the context of the code language is to be undertaken. PCC 33.815.225 sets forth approval criteria for all types of Radio Frequency Transmission Facilities. Specifically, the introduction to PCC 33.815.225 states that "these approval criteria allow Radio Frequency Transmission Facilities in locations where there are few impacts on nearby properties."

There are four subparts (A, B, C and D) within PCC 33.815.225.¹

Three of the subparts involve facilities operating at 1,000 watts ERP or less. Only the last subpart, a catch-all section, does not include reference to operating at 1,000 watts ERP or less. Each of the subparts contains minimum approval criteria; the approval criteria establishing the level of acceptable impacts of a proposed Radio Frequency Transmission Facility. The Hearings Officer finds nothing in the contextual review to provide interpretative direction for the phrase “facilities operating at 1,000 watts ERP or less.”

Part of the PGE v. BOLI analysis is to consider “rules of construction.” As noted above PCC mandates literal readings of code language. The one “rule of construction” that provides some assistance interpreting “facilities operating at 1,000 watts ERP or less” is PCC 33.700.070 D.1 (defining terms). The Hearings Officer takes note that ERP is a PCC defined term. The Hearings Officer finds that ERP relates to power emissions from “a radio frequency antenna.” The Hearings Officer finds that the words “facilities” and “antenna” are not defined in PCC but do have dictionary definitions. Using the dictionary definitions for “facilities” and “antenna,” the Hearings Officer can rephrase the language of PCC 33.815.225 C to read as follows:

Approval criteria for something built (installed, established) to serve a particular purpose operating at 1,000 watts of power emitted from a radio frequency antenna. (Hearings Officer rephrased language of PCC 33.815.225 C)

The Hearings Officer finds additional support for the concept of ERP is the power to a single antenna in the Federal Code. *47 CFR Ch. 1 Subpart C Section 27.4 Terms and Definitions* (10-1-04 Edition) (See Exhibit H.26b, page 372).

The Hearings Officer finds that ERP must be given its defined meaning. The Hearings Officer finds that ERP wattage relates to one and only one antenna. The Hearings Officer finds that if there are nine antennas, the ERP for the facility/tower is the highest reading for a single antenna.

The Hearings Officer finds that the most plausible interpretation of PCC 33.815.225 C is that the 1,000 watt ERP threshold for a facility is the ERP for a single antenna.

¹ The four subparts set forth approval criteria for:

- A. facilities operating at 1,000 watts ERP or less, on an existing building or non-broadcast structure in an OS or R zone or in a C, E, or I zone within 50 feet of an R zone;
- B. facilities operating at 1,000 watts ERP or less, locating on a tower in OS or R zone, or in a C, E, or I zone within 50 feet of R zone;
- C. facilities operating at 1,000 watts ERP or less, on a tower in a C or EX zone more than 50 feet from an R zone;
- D. all other Radio Frequency Transmission Facilities.

The Hearings Officer agrees with BDS staff that the PCC 33.815.225 C language is properly interpreted to read ERP is based upon one antenna. The Hearings Officer finds there is no reference to “channel” in PCC 33.815.225 or any definition of any word found in PCC 33.815.225, PCC 33.274, or PCC 33.910. Therefore, the Hearings Officer disagrees with BDS staff’s interpretation that ERP limits are based upon “one channel.” (See Exhibit H.26, page 2).

ERP Wattage Estimates: In order for PCC 33.815.225 C to apply, the Hearings Officer must find that there is substantial evidence in the record to support a conclusion that each antenna at the facility operates at less than 1,000 watts ERP.

The Hearings Officer reviewed documents in the case file. The Hearings Officer summarizes the evidence submitted by the Applicants and BDS staff, related to ERP wattage emitted at the project proposed in this application, as follows:

Exhibit A.4	Radio Frequency Transmission Form	ERP <10,000
Exhibit G.4	BDS letter to Applicant	ERP <10,000 ²
Exhibit A.3	Revised NEEA – August 2011 Hatfield & Dawson Electrical Engineers	ERP <759 ³
Exhibit H.27	Revised NEEA – October 2011 Hatfield & Dawson Electrical Engineers	ERP <759 ⁴
Exhibit H.26	BDS staff memo to Hearings Officer	ERP <759 ⁵
Exhibit H.28b	Revised Radio Frequency Transmission Facilities Registration Form	ERP 39.28 ⁶

² “please verify that the facility operates at a maximum of 1,000 watts ERP.”

³ Page 3: “According to Verizon RF Engineer Jeff Culley the maximum Effective Radiated Power (ERP) for any single channel from any of the Verizon antennas will be less than 759 watts. Therefore the facility will operate at less than 1000 watts *based on one channel of one antenna*”

⁴ Page 3: “Verizon RF Engineer Jeff Culley provided the following detailed information about the maximum Effective Radiated Power (ERP) level from a single sector of the POR Foster facility. The ERPs shown in the following table assume one channel per transmitter (“TX”) based on the maximum number of transmitters expected to be installed at the proposed facility. All of the per-channel power levels will be less than the maximum power limits allowed by FCC rules. The maximum ERP for any single channel from any of the Verizon antennas will be less than 759 watts. Therefore the facility will operate at less than 1000 watts *based on one channel of one antenna.*”

⁵ BDS memo quotes NIER report ... “the maximum Effective Radiated Power [ERP] for any single channel from any of the Verizon antennas will be less than 759 watts. Therefore the facility will operate at less than 1,000 watts based on one channel of one antenna.”

⁶ Identifies 9 panel type antennas at site.

The Hearings Officer has multiple concerns about the Applicants' representation of the ERP wattage estimates for the proposed facility. These concerns are summarized in the bullet points and discussed in the following findings:

- The Applicants' ERP wattage statements on Radio Frequency Transmission Facilities Registration Form (Exhibits A.4 and H.28.b); and
- The Applicants' reliance upon ERP wattage data/estimates provided by "Verizon RF Engineer" (Exhibits A.3 and H.2 H.28.a); and
- The Applicants' ERP wattage estimates based upon "one channel of one antenna."

The Applicants' Wattage Statements in Exhibits A.4 and A.28.b provide a wide variation and appear to be unsupported. The Applicants, in Exhibit A.4, indicated that ERP wattage was less than 10,000 and in Exhibit H.28.b was precisely 39.28. The Hearings Officer notes that the Applicants acknowledged an error in the less than 10,000 watt estimate (Exhibit H.28, page 1). However, the Hearings Officer could find no documentation and/or support for the Applicants' 39.28 ERP wattage statement. The Hearings Officer finds that the Applicants' ERP wattage statement in Exhibit H.28 is not a credible ERP wattage estimate.

The Applicants' reliance upon ERP wattage data/estimate provided by a "Verizon RF Engineer" is challenged by the Opponents (Exhibits H.18a, H.22 and H.24). During the Applicants' rebuttal at the public hearing, the Applicants' representative stated,

"Jeff Culley, who is a licensed RF engineer for Verizon, offhand not sure how many states licensed in but did have license in Idaho and Oregon."

Mr. Culley, in Exhibit H.7, represents (under his signature) that he is an "RF Engineer." The Opponents assert that the person represented as a licensed RF engineer is in fact not licensed in Oregon (Exhibit H.24). The Opponents, therefore, contend that data/conclusions offered by this person are not credible and the Hearings Officer cannot rely upon such data/conclusions.

Exhibits H.24b and H.24c are represented by an Opponent to be Oregon State Board of Examiners for Engineering and Land Surveying inquiries as to the licensing status of Mr. Culley.⁷ These documents indicate Mr. Culley is not an Oregon licensed engineer.

Exhibits H.24d and H.24e provide additional information regarding licensing requirements of "RF engineers." These two documents include summary notes from the Law Enforcement Committee ("LEC") of the State Board of Examiners for Engineering & Land Surveying meetings of October 10, 2008 and February 12, 2009. The case discussed in Exhibits H.24d and H.24e involved a T-Mobile employee who signed documents as an "RF engineer" which were then submitted to the City of Springfield, Oregon. In summary, the LEC found that T-Mobile "offered their engineering work to a public agency for approval or denial" and therefore the person signing as an "RF engineer" must actually be a licensed engineer in Oregon.

⁷ Exhibit H.24c states "at this time we do not have an Active registrant with the last name Culley. However, I do see we once had a registrant with the last name Culley but their license has since lapsed and been removed from our database."

The Hearings Officer finds that Mr. Culley did sign a document submitted to the City (Exhibit H.7) as an "RF engineer." The Hearings Officer finds the Applicants' representative, at the public hearing, testified that Mr. Culley was a licensed "RF engineer" in Oregon. The Hearings Officer finds, based upon Exhibits H.24.d and H.24.e, that a wireless service provider employee who offers documents to a City in support of an application and signs as an "RF engineer" must be licensed with the Oregon State Board of Examiners for Engineering & Land Surveying. The Hearings Officer finds the Applicants provided no written evidence supporting the claim that Mr. Culley was an Oregon licensed "RF engineer." Based solely upon the evidence in the record in this case, the Hearings Officer finds that the Applicants' representation that Mr. Culley is an Oregon licensed "RF engineer" is not correct. As such, the Hearings Officer finds any statements made by Mr. Culley to generally lack credibility. Further, the Hearings Officer finds any statements made by any third party that rely upon Mr. Culley's statements to generally lack credibility.⁸

The Applicants' ERP wattage estimates based upon "one channel of one antenna" are not consistent with the Hearings Officer's interpretation of PCC 33.815.225. In findings above, the Hearings Officer determined that the PCC 33.815.225 C.1 phrase (also used in PCC 33.815.225 A and B) "facilities operating at 1,000 watts ERP or less" means ERP wattage related to one and only one antenna. The Hearings Officer also found that the phrase did not mean include any reference to the word "channel."

Exhibit H.28a, page 3, states that "the facility will operate at less than 1000 watts *based on one channel of one antenna.*" In addition to the Hearings Officer concerns about the credibility of the ERP estimate (see findings related to "RF engineer" above), the Hearings Officer finds that the Exhibit H.28a statement is non-responsive to the Hearings Officer's interpretation of the PCC 33.815.225 phrase "facilities operating at 1,000 watts ERP or less." The Exhibit H.28a statement refers to "channel of one antenna." The Hearings Officer interpretation of PCC 33.815.225 phrase "facilities operating at 1,000 watts ERP or less" refers to a single antenna and a channel of one antenna.

The Hearings Officer finds the presentation information in Exhibit H.28a does not directly correlate to PCC 33.815.225. For example, Exhibit H.28a, indicates that each antenna will have three sectors (See also Exhibit C.2) and that the "Total ERP per sector (watts) = 6,724" (Exhibit H.28a, page 3). Thereafter, on page 4 of Exhibit H.28a, it is said that "total ERP per sector will be less than 10,000 watts."

The Hearings Officer finds that Exhibit H.28a is directed towards the satisfaction of development standards set forth in PCC 33.274.070.C.5. The Hearings Officer finds that

⁸ Exhibit A.3 states "according to RF Engineer Jeff Culley the maximum Effective Radiated Power (ERP)..." and Exhibit H.28a states "Verizon RF Engineer Jeff Culley provided the following detailed information about the maximum Effective Radiated Power (ERP) levels..." These statements and the resulting conclusions drawn by Hatfield & Dawson, because of the apparent misrepresentation of Mr. Culley's licensing status, were considered generally lacking credibility.

Exhibit H.28a does not provide substantial evidence that the facility operates at 1,000 ERP or less as required by PCC 33.815.225 C. The Hearings Officer finds that the combination of the Applicants' conflicting representations (less than 10,000 in Exhibit A.4 and 39.28 in Exhibit H.28b), the lack of credibility of the Applicants' "RF engineer," and the lack of responsiveness in Exhibit H.28a to PCC 33.815.225 ("facilities operating at 1,000 watts ERP or less") result in the Applicants' failure to demonstrate that PCC 33.815.225 C is the applicable approval criteria. The Hearings Officer finds, based upon the evidence in the record, that the question of which approval criterion (PCC 33.815.225 C or D) applies remains undetermined.


Summary of Findings for PCC 33.815.225.

Because the Hearings Officer determined, in the findings above, that the Applicants did not provide substantial evidence to persuade the Hearings Officer that PCC 33.815.225 C applied (an alternative would have been to apply PCC 33.815.225 D), the Hearings Officer finds this application must be denied. The Hearings Officer finds that the Applicants and BDS staff addressed the approval criteria in PCC 33.815.225 C.

III. DECISION

Denial of:

- A Conditional Use; and
- An Adjustment to waive landscaping as required at 33.274.040.9.a.[1] & [2]



Gregory J. Frank, Hearings Officer

11/2/11

Date

Application Determined Complete:	August 8, 2011
Report to Hearings Officer:	September 23, 2011
Decision Mailed:	November 3, 2011
Last Date to Appeal:	4:30 p.m., November 17, 2011
Effective Date (if no appeal):	November 18, 2011 Decision may be recorded on this date.

Appeal of the decision. ANY APPEAL OF THE HEARINGS OFFICER'S DECISION MUST BE FILED AT 1900 SW 4TH AVENUE, PORTLAND, OR 97201 (503-823-7526). Until 3:00 p.m., Tuesday through Friday, file the appeal at the Development Services Center on the first floor.

Between 3:00 p.m. and 4:30 p.m., and on Mondays, the appeal must be submitted at the Reception Desk on the 5th Floor. **Appeals must be filed within 14 days of the decision. An appeal fee of \$5,000.00 will be charged (one-half of the BDS application fee, up to a maximum of \$5,000).** The application fee is \$16,870.00; therefore half that amount exceeds \$5,000. Information and assistance in filing an appeal can be obtained from the Bureau of Development Services at the Development Services Center.

Who can appeal: You may appeal the decision only if you wrote a letter which is received before the close of the record on hearing or if you testified at the hearing, or if you are the property owner or applicant. If you or anyone else appeals the decision of the Hearings Officer, only evidence previously presented to the Hearings Officer will be considered by the City Council.

Appeal Fee Waivers: Neighborhood associations recognized by the Office of Neighborhood Involvement may qualify for a waiver of the appeal fee provided that the association has standing to appeal. The appeal must contain the signature of the Chair person or other person authorized by the association, confirming the vote to appeal was done in accordance with the organization's bylaws.

Neighborhood associations, who wish to qualify for a fee waiver, must complete the Type III Appeal Fee Waiver Request for Organizations Form and submit it prior to the appeal deadline. The Type III Appeal Fee Waiver Request for Organizations Form contains instructions on how to apply for a fee waiver, including the required vote to appeal.

Recording the final decision.

If this Land Use Review is approved the final decision must be recorded with the Multnomah County Recorder. A few days prior to the last day to appeal, the City will mail instructions to the applicant for recording the documents associated with their final land use decision.

- *Unless appealed*, The final decision may be recorded on or after the day following the last day to appeal. The Hearings Officer's decision will identify the appeal period and the effective date if no appeal is filed.
- A building or zoning permit will be issued only after the final decision is recorded.

The applicant, builder, or a representative may record the final decision as follows:

- **By Mail:** Send the two recording sheets (sent in separate mailing) and the final Land Use Review decision with a check made payable to the Multnomah County Recorder to: Multnomah County Recorder, P.O. Box 5007, Portland OR 97208. The recording fee is identified on the recording sheet. Please include a self-addressed, stamped envelope.
- **In Person:** Bring the two recording sheets (sent in separate mailing) and the final Land Use Review decision with a check made payable to the Multnomah County Recorder to the County Recorder's office located at 501 SE Hawthorne Boulevard, #158, Portland OR 97214. The recording fee is identified on the recording sheet.

For further information on recording, please call the County Recorder at 503-988-3034.

For further information on your recording documents please call the Bureau of Development Services Land Use Services Division at 503-823-0625.

Expiration of this approval. An approval expires three years from the date the final decision is rendered unless a building permit has been issued, or the approved activity has begun.

Where a site has received approval for multiple developments, and a building permit is not issued for all of the approved development within three years of the date of the final decision, a new land use review will be required before a permit will be issued for the remaining development, subject to the Zoning Code in effect at that time.

Zone Change and Comprehensive Plan Map Amendment approvals do not expire.

Applying for your permits. A building permit, occupancy permit, or development permit may be required before carrying out an approved project. At the time they apply for a permit, permittees must demonstrate compliance with:

- All conditions imposed herein;
- All applicable development standards, unless specifically exempted as part of this land use review;
- All requirements of the building code; and
- All provisions of the Municipal Code of the City of Portland, and all other applicable ordinances, provisions and regulations of the City.

EXHIBITS
NOT ATTACHED UNLESS INDICATED

- A. Applicant's Statement
 - 1. Proposal Narrative
 - 2. Engineering Certification March 2011 [superseded]
 - 3. Engineering Certification August 2011
 - 4. RF Registration Form
 - 5. Extension of 120 day clock and FCC shot clock for 30 days
 - 6. Search Area Map
 - 7. Color photos of Mt. Scott Fuel [subject site]
 - 8. Color photos of existing monopole at 6514 SE Foster
- B. Zoning Map (**attached**)
- C. Plans and Drawings
 - 1. Site Plan (**attached**)
 - 2. Elevation (**attached**)
 - 3. Title Sheet
 - 4. Enlarged site plan
- D. Notification information
 - 1. Request for response
 - 2. Posting letter sent to applicant
 - 3. Notice to be posted
 - 4. Applicant's statement certifying posting
 - 5. Mailing list
 - 6. Mailed notice [September 9, 2011]
 - 7. Mailed CORRECTION of Neighborhood Contact [September 14, 2011]
- E. Agency Responses
 - 1. Bureau of Environmental Services
 - 2. Bureau of Transportation Engineering and Development Review
 - 3. Water Bureau
 - 4. Fire Bureau
 - 5. Site Development Review Section of Bureau of Development Services
 - 6. Bureau of Parks, Forestry Division
- F. Letters
 - 1. Cooper, email thread Sept 12 – Sept 13; re: notification and process concerns
 - 2. Hermans, email thread Sept 13 – Sept 14; re notification and process concerns
 - 3. R. Ransom, email Sept 14, re: view the file and obtaining copies
 - 4. Cooper et al., letter Sept 15; re: opposition and discussion of lack of evidence from applicant demonstrating compliance with criteria
 - 5. Trisler, Fax Sept 16; re: opposition and discussion of how applicant fails to meet criteria
 - 6. Hermans, Letter Sept 16; re: opposition and discussion of how the proposal fails to meet the criteria
 - 7. McKeever, Fax, Sept 16; re: opposition and discussion of how applicant fails to meet the criteria

8. Cunningham et al., Fax, Sept 16, re: opposition and discussion of how applicant fails to meet the criteria

G. Other

1. Original LUR Application
2. Site History Research
3. Pre Application Conference Summary Notes
4. Incomplete letter to applicant, April 26, 2011
5. FCC Shot Clock Declaratory Ruling
6. Legislative comments regarding approval criterion for placement in ROW
7. Legislative comments regarding another tower within 2,000 feet as a review trigger
8. Pre App Notes for 02-104162
9. Pre App Notes for 05-135801
10. Excerpt from *FCC Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services-Fifteenth Report* -- released June 27, 2011

H. Received in the Hearings Office

1. 8/10/11 Memo - McKinney, Susan
2. Notice of Public Hearing - Cate, Sylvia
3. Correction of a Public Hearing Notice - Cate, Sylvia
4. 9/15/11 Letter - Cooper, Matthew
5. 9/16/11 Letter - Hermans, Marcel
6. Staff Report - Cate, Sylvia
7. 9/26/11 letter from Jeff Cully with attachments - Cate, Sylvia
 - a. Existing coverage - Cate, Sylvia
 - b. Proposed coverage - Cate, Sylvia
8. Request for Extension of 120-day Review Period - Cate, Sylvia
9. Request for Extension of Review Period as mandated by FCC Declaratory Ruling: WT Docket No. 08-165 - Cate, Sylvia
10. E-mails, "Euro Guy" and Cate - Cate, Sylvia
11. 10/2/11 Memo, Li Alligood to Cate - Cate, Sylvia
12. PowerPoint presentation printout - Cate, Sylvia
13. Opposition Testimony Sign Up Sheet - Hearings Office
14. Opposition Testimony Sign Up Sheet - Hearings Office
15. Testimony sheet with attachments - Sutton, Neal
 - a. 10/2/11 letter from Mt. Scott-Arleta NA Board - Sutton, Neal
 - b. Petition to City Council - Sutton, Neal
 - c. Petition to Verizon Wireless and City Council - Sutton, Neal
 - d. Petition to Commissioner Saltzman - Sutton, Neal
 - e. Photos - Sutton, Neal
16. Google Maps printout with attachment - Hermans, Marcel
 - a. 10/2/11 letter - Hermans, Marcel
17. Testimony sheet - Cooper, Charlotte
18. Testimony sheet with attachments - Hill, Chris
 - a. 10/3/11 letter to Cate - Hill, Chris

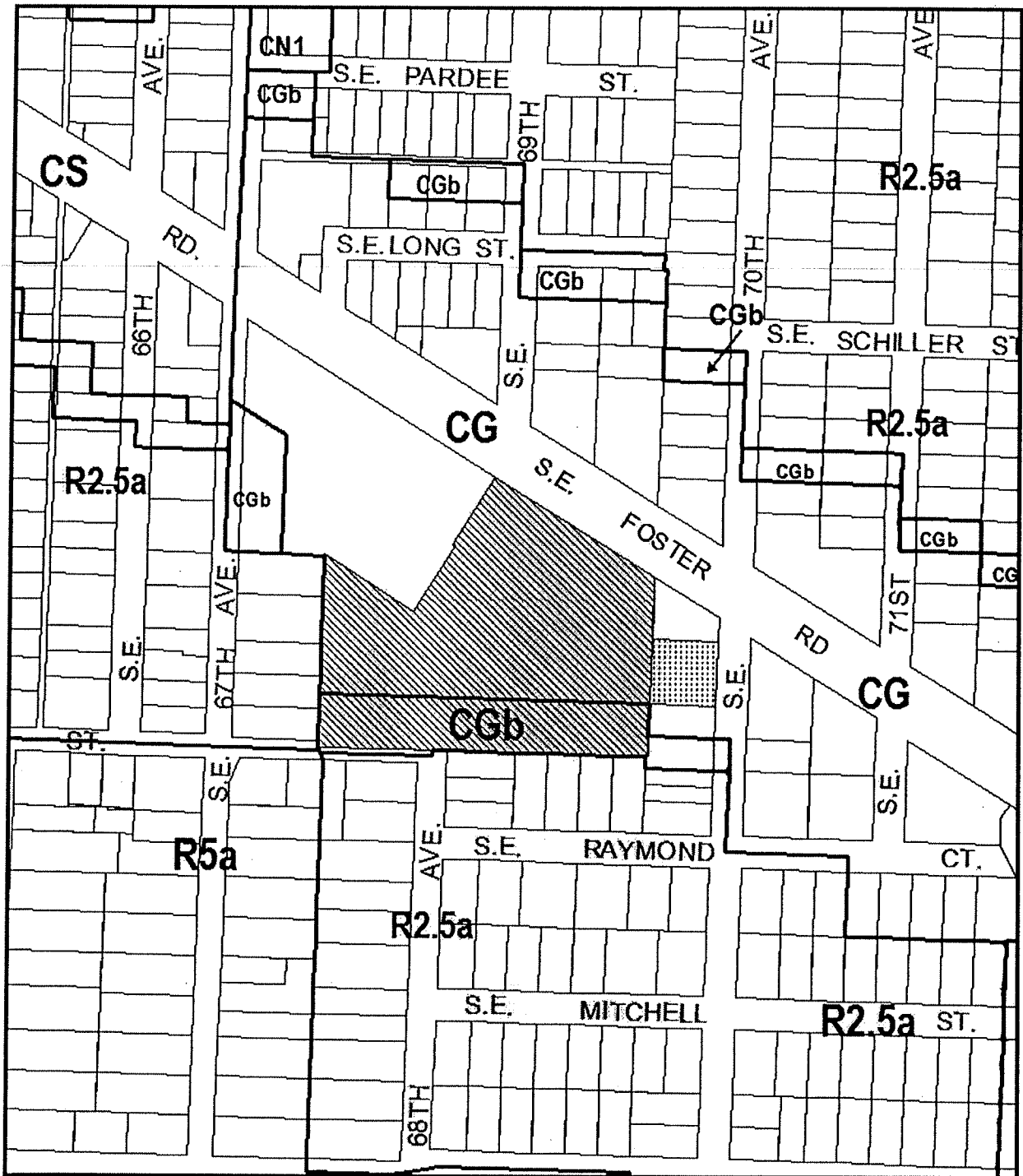
- b. Amphenol Antenna Solutions BXA-70063-6CF-EDIN-X - Hill, Chris
 - c. Amphenol Antenna Solutions BXA-70063-6BF-EDIN-X - Hill, Chris
 - d. Amphenol Antenna Solutions BXA-80080-6CF-EDIN-X - Hill, Chris
 - e. Amphenol Antenna Solutions BXA-185085-12BF-EDIN-X-FP - Hill, Chris
 - f. Amphenol Antenna Solutions BXA-185085-12CF-EDIN-X - Hill, Chris
19. Testimony sheet - Cooper, Matthew
20. Testimony sheet with attachments - Joy, Eric
- a. Burbank ACTION (Against Cell Towers In Our Neighborhood) article - Decreased Real Estate Value - Joy, Eric
 - b. AntiCellTowerLawyers.com website printout - Does the Installation of a Cell Tower Reduce the Value of Nearby Properties? - Joy, Eric
 - c. Entrepreneur article - The effect of distance to cell phone towers on house prices in Florida - Joy, Eric
 - d. The Island Park News article - Cell tower & cell phone safety - Joy, Eric
 - e. Oregonlive.com article - Clearwire withdraws controversial wireless site applications after Northeast Portland neighbors and others push back - Joy, Eric
21. 10/5/11 Mailing List Addition - Cate, Sylvia
22. Letter from Regan Ransom-Hermans - McKeever, Liz C.
- a. Email String from Regan Ransom-Hermans - McKeever, Liz C.
 - b. Radio Frequency Transmission Facilities Registration Form: Ridge Communications from Regan Ransom-Hermans - McKeever, Liz C.
 - c. 4/26/11 Letter from BDS to Laura Hopfer from Regan Ransom-Hermans - McKeever, Liz C.
 - d. Compliance With City Regulations Based on Separation Distance from Regan Ransom-Hermans - McKeever, Liz C.
 - e. FCC Guide: Human Exposure to RF Fields Guidelines For Cellular and PCS Sites from Regan Ransom-Hermans - McKeever, Liz C.
23. 10/9/11 Letter from Matthew Cooper - McKeever, Liz C.
24. Letter from Neal Sutton - McKeever, Liz C.
- a. Article from the Appraisal Journal from Neal Sutton - McKeever, Liz C.
 - b. Database print Screens from Neal Sutton - McKeever, Liz C.
 - c. Email from Brianna Weekly to Euro Guy, by Neal Sutton - McKeever, Liz C.
 - d. Law Enforcement Committee Meeting Summary 10/10/08 from Neal Sutton - McKeever, Liz C.
 - e. Law Enforcement Committee Meeting Summary 2/12/09 from Neal Sutton - McKeever, Liz C.
 - f. Notice of Pre-Application Conference from Neal Sutton - McKeever, Liz C.
25. Letter - O'Connor, Shannon
26. 10/10/11 Memo with attachments - Cate, Sylvia
- a. Human Exposure to RF Fields Guidelines for Cellular and PCS Sites - Cate, Sylvia
 - b. FCC excerpts - Cate, Sylvia
 - c. FCC "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance: June 2, 2000 - Cate, Sylvia

- d. FCC Office of Engineering & Technology "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields August 1997 - Cate, Sylvia

27. Record Closing Information - Hopfer, Laura

28. 10/6/11 Memo with attachments - Hopfer, Laura

- a. Supplement to Revised Report - Hatfield & Dawson - October 2011 - Hopfer, Laura
- b. Radio Frequency Transmission Facilities Registration Form - Hopfer, Laura



ZONING

-  Site
-  Also Owned



File No.	<u>LU 11-125536 CU_AD</u>
1/4 Section	<u>3537</u>
Scale	<u>1 inch = 200 feet</u>
State Id	<u>1S2E17BA 12400</u>
Exhibit	<u>B (Apr 08,2011)</u>

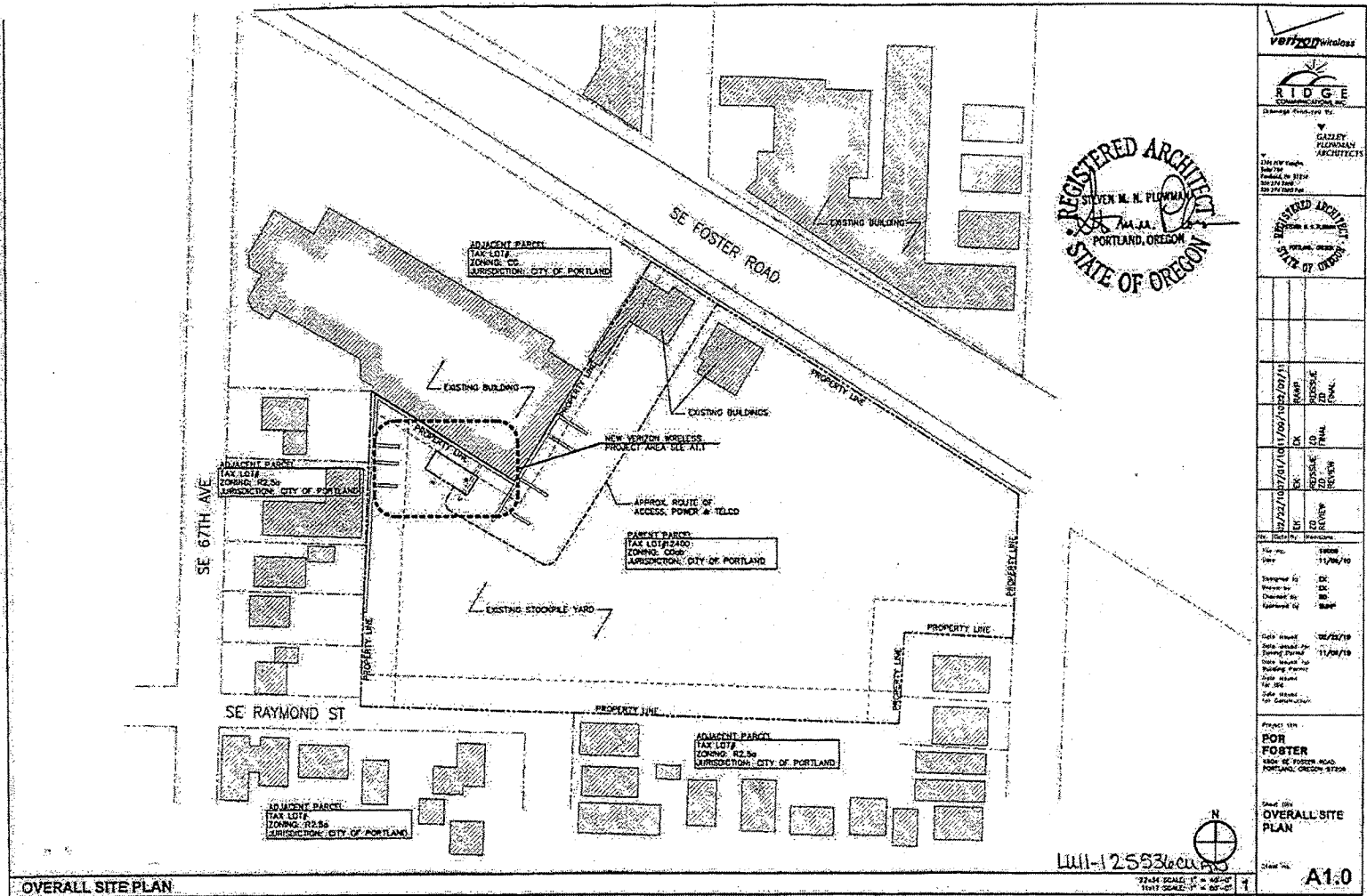
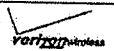
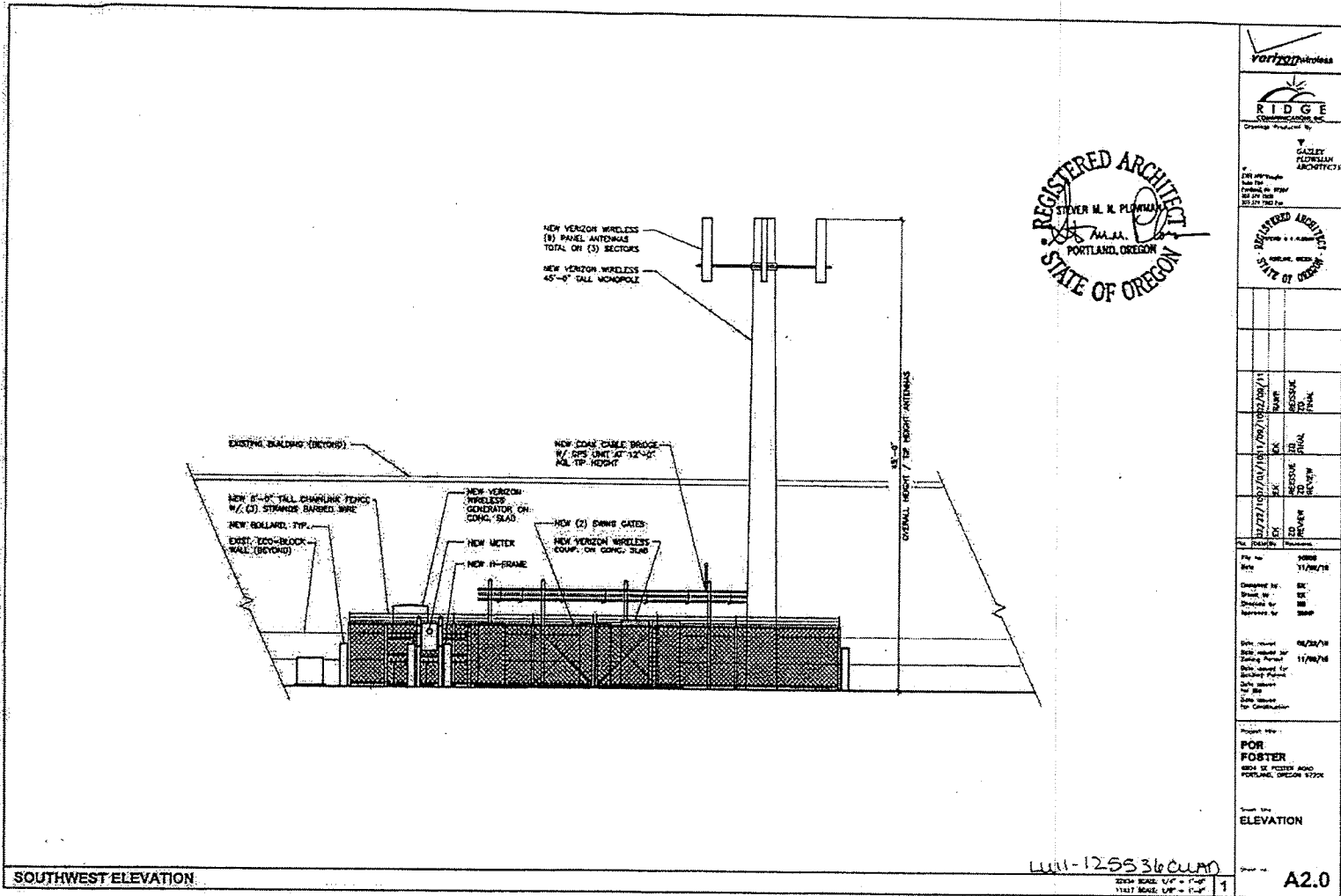


EXHIBIT C-1
site plan
8x10



GALEY FLORELL ARCHITECTS

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SOUTHWEST ELEVATION

LW11-1255360111

2014 SCALE: 1/4" = 1'-0"

1117 SCALE: 1/4" = 1'-0"

A2.0

EXHIBIT C-2
elevation
8x10

**GENERAL EXPLANATION OF CITY COUNCIL APPEAL HEARING PROCESS FOR
ON-THE-RECORD APPEALS**

1. SUBMISSION OF LEGAL ARGUMENT

- a. On-the record appeals are limited to legal argument only. The only evidence that will be considered by the City Council is the evidence that was submitted to the HEARINGS OFFICER prior to the date the HEARINGS OFFICER closed the evidentiary record. Parties may refer to and criticize or make arguments in support of the validity of evidence received by the HEARINGS OFFICER. However, parties may not submit new evidence to supplement or rebut the evidence received by the HEARINGS OFFICER.
- b. Legal argument may be mailed to the Council Clerk, 1221 SW Fourth Avenue, Room 140, Portland, OR 97204. Written legal argument must be received by the time of the hearing and should include the case file number.
- c. Legal argument may be submitted orally (see below).

2. COUNCIL REVIEW

- a. The order of appearance and time allotments are generally as follows:

Staff Report	10 minutes
Appellant	10 minutes
Supporters of Appellant	3 minutes each
Principal Opponent	15 minutes
Other Opponents	3 minutes each
Appellant Rebuttal	5 minutes
Council	

- b. The applicant has the burden of proof to show that the evidentiary record compiled by the HEARINGS OFFICER demonstrates that each and every element of the approval criteria is satisfied. If the applicant is the appellant, the applicant may also argue the criteria are being incorrectly interpreted, the wrong approval criteria are being applied or additional approval criteria should be applied.
- c. In order to prevail, the opponents of the applicant must persuade the City Council to find that the applicant has not carried the burden of proof to show that the evidentiary record compiled by the HEARINGS OFFICER demonstrates that each and every element of the approval criteria is satisfied. The opponents may wish to argue the criteria are being incorrectly applied, the wrong approval criteria are being applied or additional approval criteria should be applied.

3. OTHER INFORMATION

- a. Prior to the hearing, the case file and the Hearings Officer's decision are available for review, by appointment, at the Bureau of Development Services, 1900 SW 4th Avenue, #5000, Portland, OR 97201. Call 503-823-7617 to make an appoint to review the file.

If you have a disability and need accommodations, please call 823-4085 (TDD: 823-6868). Persons requiring a sign language interpreter must call at least 48 hours in advance.