



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: April 25, 2018

Department: Public Works Agenda Planning Date: April 19, 2018 Time required: None

Audio/Visual aids

Contact: Joe Fennimore Phone: 506-566-4177

Department Head Signature:

TITLE Receive notice of hearings officer's decision approving Administrative Review/Variance (AR/V) Case 17-023/Day Management Corporation.

Issue, Description & Background The Marion County Hearings Officer issued a decision on April 12, 2018, approving AR/V17-023. As part of the land use process, the Marion County Board of Commissioners must officially receive notice of the decision.

Financial Impacts: None.

Impacts to Department & External Agencies None.

Options for Consideration: 1. Receive notice of the decision. 2. Receive notice of the decision and call the matter up.

Recommendation: Staff recommends the board receive the notice of decision.

List of attachments: Hearings officer's decision

Presenter: Joe Fennimore

Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)

Copies to: Joe Fennimore - gfennimore@co.marion.or.us

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the) Case No. AR/V 17-023
Application of:) Clerk's File No.
DAY MANAGEMENT CORPORATION) **Administrative Review/Variance**

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on appeal of the Planning Director's **approval** of the application of Day Management Corporation for an administrative review and variance to establish a wireless communication facility on a 300 foot tall tower on a 0.92 acre parcel in a P (Public) zone located at 7050 Skyline Road SE, Salem, Oregon (T8S; R4W; Section 24DC; tax lot 300).

II. Relevant Criteria

The standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and the Marion County Code (MCC) title 17, sections 17.171.020 (F); 17.122.010; 17.122.020; 17.125.120; and ORS 215.438.

III. Public Hearing

A public hearing was held on this application on January 3, 2018. At the hearing, the Planning Division file was made part of the record. The following persons appeared at hearing:

- | | | |
|----|----------------|--|
| 1. | Lisa Milliman | Marion County Planning Division |
| 2. | Peter Dinsdale | Appellant |
| 3. | Dean Ballew | Applicant's representative |
| 4. | Neil Olsen | Applicant's attorney |
| 5. | Allen Dannen | City of Salem, Assistant City Engineer. |
| 6. | Mark Buchholz | Salem Police Department, Communications Project coordinator. |

No objections were raised to notice, jurisdiction, conflicts of interest, or evidence or testimony at hearing. Exhibit 1, an email to Mr. Dinsdale from Mr. Al Slater, was entered into the record. The record remained open until January 31, 2018 for applicant to submit additional information; until February 14, 2018 for Appellant to submit additional information; and until February 28, 2018 for Applicant to submit further response.

The following documents were submitted during the open record period and are entered into the record:

- | | |
|-----------|--|
| Exhibit 2 | January 31, 2018 Post-hearing Statement and Supplement to open record of Neil Olsen. |
| Exhibit 3 | February 14, 2018 Response to post-hearing statement and objections to proposed findings of fact and conclusions of law of Jill F. Foster, attorney on behalf of BH Land, LLC, Prospect Hill Communications, LLC, and Peter Dinsdale. The February 9, 2018 Declaration of Al Slater, Slater Sites, Inc. The February 14, 2018 Declaration of Peter Dinsdale, BH Land, LLC. A "Google earth" aerial photograph of the tower site. |

Exhibit 4 February 28, 2018 Applicant's Reply to Appellant's Response and Objections to Applicant's Post-hearing Statement and Proposed Findings of Fact and conclusions of Law.

IV. Findings of Fact

The hearings officer, after careful consideration of the evidence in the record, issues the following findings of fact:

1. The subject property is designated Public in the Marion County Comprehensive Plan. The major purpose of this designation and the corresponding P (Public) zone is to provide land for public and semi-public uses.
2. The property is located on Prospect Hill in the 7,000 block of Skyline Road SE.
3. Surrounding properties consist of land being farmed in a SA (Special Agriculture) zone and property developed with communication towers in a P zone.
4. The applicant is proposing to locate a 300 foot tall communication tower on the property to be used by the City of Salem.
5. Marion County Building Inspection commented that a permit is required for new construction.
6. All other contacted agencies either failed to comment or stated no objection to proposal.

V. Additional Findings of Fact and Conclusions of Law

1. Applicant has the burden of proving by a preponderance of substantial evidence in the whole record that all applicable standards and criteria are met. The preponderance of the evidence standard is explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

“Preponderance of the evidence’ means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests.” (Citation omitted.)]

This is a more likely than not standard for each criterion. Substantial evidence is evidence that a reasonable person would rely on in reaching a decision. *Laurel Hill Valley Citizens v. Eugene*, ___ Or LUBA ___ (LUBA No. 2015-092, March 11, 2016).

2. Under MCC 17.115.010, the Planning Director determines whether structures subject to standards are permitted in the applicable zone following MCC 17.115 administrative review procedures. The Planning Director had authority to make this determination.
3. Under MCC 17.115.110(F), on request for a hearing, the hearings officer shall hold a hearing on the matter. The Planning Director's decision was appealed to hearing. The hearings officer may hear and decide this matter.
4. Under MCC 17.115.110(A), an administrative review decision shall be made on the basis of the comprehensive plan and applicable standards and criteria in MCC title 17.

3. Marion County Code 17.171.020 (F) permits wireless communication towers on Public zoned land subject to the requirements of MCC 17.125.120 including:
 - A. In addition to the standard application materials, any request for a wireless communications facility shall include the following items:
 1. Eight photosimulations of the proposed facility and equipment enclosure as viewed from affected residential properties and public rights-of-way at varying distances at locations within a 1,000-foot radius of the proposed facility that are agreed upon by planning staff and the applicant prior to filing the application.

Appellant, in opposing the variance for construction of a 300 foot tower, challenged applicant's presentation of the eight photosimulations arguing that there is no simulation identifying Appellant's residence and representing the visual affect of the proposed tower upon Appellant's residence.

There is no single photosimulation that identifies Appellant's residence as a point of reference. However, the Hearings Officer observes from the eight photosimulations presented that there are no buildings or structures, apart from the existing communication towers at the site, within the 1000-foot radius distance required by Code for the photosimulation array.

Applicant has met the burden of including the required photosimulations.

2. Map showing the location and service area of the proposed wireless communications facility and an explanation of the need for that facility.

The Applicant has provided a map of the service area of the proposed facility.

Appellant challenges the need for an additional facility on Applicant's site, arguing that an alternative site on an existing 320 foot tower very near Applicant's site will also meet the need. Both Appellant and Applicant agree, or at least Appellant does not disagree, that the identified need for the facility is to attain a 97% reliability standard for first responders in the selected coverage area.

Appellant and Applicant also agree that to attain the 97% reliability coverage standard the facility must be at least 300 feet in height. The point of departure is: should the facility be on the existing 320 foot tower on the property of Al Slater, owner of Slater Sites, Inc. or on a proposed 300 foot tower to be constructed by Applicant.

This issue is described in detail in the discussion of co-location in Section 8, see below.

Applicant has met its burden as to the service area map and need for the facility.

3. Map showing the locations and service areas of other wireless communications facilities/sites operated and proposed by the applicant that are close enough to affect service.

Applicant has provided a map showing the location and service area of two existing communication facilities on the site of the proposed 300 foot facility that are operated by the Applicant, as well as a map of the service area of the proposed 300 foot tower

Appellant argues that applicant does not address the existing 320 foot facility owned and operated by Slater Sites, Inc.

This issue is described in detail in the discussion of co-location in Section 8, see below.

Applicant has met its burden of providing a map of related facilities.

4. Site/landscaping plan showing the specific placement of the wireless communications facility on the site, the location of existing structures, trees, and other significant site features, type and locations of proposed screening, and the proposed color(s) for the wireless communications facility and equipment enclosure.

Applicant has met its burden of providing the required site/landscaping plan.

5. Signed agreement providing that the applicant shall remove the facility and equipment enclosure within six months of the date it ceases to be operational.

Applicant has met its burden of providing the required agreement.

6. Lease agreement with the landowner or contract purchaser that allows the landowner or contract purchaser to enter into leases with other providers; and specifies that if the provider fails to remove the facility and equipment enclosure within six months of the date it ceases to be operational, the responsibility for removal falls upon the landowner or contract purchaser.

Applicant has met its burden of providing the required lease agreement.

7. Anticipated capacity of the wireless communications facility (including number and types of antennas which can be accommodated); and the number of additional wireless communications facility, attached, that may be co-located on the proposed tower.

Applicant has provided the required statement of anticipated capacity, additional wireless facility and co-location capacity.

Appellant argues that Applicant has not addressed the various "impacts" the additional capacity of the proposed tower may have on such items as maintenance, visual image, safety to adjacent property, people, other towers, and migrating birds.

The Hearings Officer understands this required item (No. 7) to be an accounting-type requirement rather than an "impact study."

Applicant has met its burden as to the capacity of the facility.

8. Evaluation of the feasibility of co-location of the subject facility as an alternative to the requested permit. The feasibility study must include:
 - a. Written verification or other documentation revealing the availability and/or cooperation shown by other providers to gain access to existing sites/facilities to meet the needs of the applicant.

The Hearings Officer makes the following findings:

Appellant and Applicant have presented evidence that the city of Salem, in developing its project to replace an aging and diverse communication system with a consolidated first responder communication system to serve a wide area to include portions of Marion and Polk

Counties, began working with Al Slater, Slater Sites, Inc. operators of the existing 320 foot tower at the location in SW Salem in 2016.

The Declarations of Mr. Slater and of Alan Dannen, Professional Engineer and Assistant City Engineer of the city of Salem, the email correspondence between Mr. Slater and representatives of the city between September 2016 and April 2017, and particularly the testimony of Division Commander Mark Buchholz, city of Salem Police Department, Communications Unit, all evidence the city's initial interest in Mr. Slater's existing 320 foot tower as a viable facility.

The city of Salem's Radio Engineering firm, Motorola, also expressed interest in using the 320 foot tower as opposed to the construction of an entirely new tower. Motorola was concerned about the ability of the existing tower to handle the additional equipment necessary for the city of Salem communications project, and in September 2016 the city requested Mr. Slater to provide structural analysis studies and other information. Over the next seven months and with on-going correspondence between the city and Mr. Slater, Mr. Slater had not submitted the requested structural analysis and other data to the city.

In his Declaration Mr. Slater states that on an unspecified date "I contacted the Project Delivery Group and informed them of the completed Structural Analysis and our compliance."

Mr. Slater's telephone and email contact at the Project Delivery Group from September 2016 to September 2017 was Brianna Perdue. In her February 27, 2018 Declaration Ms. Perdue states that she has no recollection of receiving the structural analysis from Mr. Slater.

Mr. Dannen in his Declaration of February 28, 2018 states that he instructed the city and the Project Delivery Group to undertake a review of records for receipt of a structural analysis, and states that "No evidence was found of receipt of the alleged structural analysis by the City or PDG."

Mr. Slater further states in his Declaration, page 2, that a current user of the tower, T-Mobile, was included in the design analysis "so that all modifications could be done simultaneously using the city of Salem equipment."

Mr. Slater does not state that he retained a copy of the Structural Analysis or that a copy was provided to T-Mobile.

Appellant is unable to establish by substantial evidence that the requested Structural Analysis was provided to the city of Salem and/or to their radio engineers at Motorola.

The Hearings Officer is persuaded that substantial evidence was provided by the testimony of Division Commander Mark Buchholz. Commander Buchholz testified that "...our concern was about the use of the site (the 320 foot tower) and the ability to use our equipment. There was a lack of response by Al Slater, and it became difficult working with him. We would have had an agreement with Mr. Slater six months ago if he had cooperated."

As of the date of the Administrative Hearing the structural analysis requested by the city of Salem had not been provided by Mr. Slater.

The Applicant has met its burden of establishing a lack of feasibility for co-location.

- b. Compliance with the requirements of subsection (A)(8)(a) of this section may be demonstrated by providing evidence of mailing the following co-location

request letter to all other wireless providers licensed to provide service within the county:

Pursuant to the requirements of MCC 17.120.080(A)(8)(a), (wireless provider) is hereby providing you with notice of our intent to make application with Marion County to locate a freestanding wireless communications facility that would be located at _____. In general, we plan to construct a support structure of ___ feet in height for the purpose of providing (cellular, PCS, etc.) service.

Please inform us whether you have any wireless facilities located within (distance) of the proposed facility, that may be available for possible co-location opportunities. Please provide us with this information within 15 business days after the date of this letter. Your cooperation is appreciated.

There is no dispute. The Applicant has met its burden of compliance.

c. Tower type and height of potential co-locations facilities.

The applicant has met its burden. See Findings of Fact under sections no. 2 and no. 8 above.

d. Specific reasons why co-location is or is not feasible. Reasons may include but are not limited to the following:

- i. A statement from a qualified radio engineer indicating whether the necessary service can or cannot be provided by co-location at the identified site(s) by the other provider.
- ii. Evidence that the lessor of the site(s) identified by the other provider(s) either agrees or disagrees to co-location on their property.
- iii. Evidence that adequate site area exists or does not exist at the site(s) identified by the other provider(s) to accommodate needed equipment and meet all of the site development standards.

The Hearings Officer finds by substantial evidence that specific reasons do exist for the non-feasibility of co-location.

- a. There continues to be a question and a concern regarding the ability of the alternative 320 foot tower to structurally and reliably maintain the communication equipment of the city of Salem.
- b. The operator of the alternative tower was not in contact with the city of Salem or with the project task force after April 2017 in order to coordinate and manage co-location.
- c. The city of Salem has determined that the best interests and welfare of the public are not served by co-locating the proposed tower based upon the circumstances and conditions of the project.
- d. See also Findings of Fact under sections no. 2 and no. 8 above.

9. A narrative discussion of how the proposed facility and equipment enclosure complies with applicable use and development standards.

- B. Notwithstanding other height limitations in this title all lattice, monopole, guyed or other freestanding support structures shall be limited to a total height, including antennas, of 150 feet above natural grade.
- C. Lattice, monopole, guyed or other freestanding support structures, antennas, associated enclosures and all exterior mechanical equipment shall be surfaced so as to be nonreflective. For purposes of this requirement a galvanized metal monopole shall be considered nonreflective.
- D. The wireless communications facility including equipment enclosures shall be fenced by a six-foot-high fence, wall or hedge.
- E. Notwithstanding other setback standards in this title the exterior base of a lattice, monopole, guyed or other freestanding support structure shall be separated from all dwellings and residential accessory structures not located on the subject property, and residential zone boundaries (including the AR, CC and C zones) by a distance equal to one foot greater than the total height of the support structure and antennas. A freestanding support structure may be placed closer to a residential zone boundary (including the AR, CC and C zones) where it is demonstrated that location of the proposed facility closer to the boundary will take advantage of an existing natural or artificial feature to conceal the facility or minimize its visual impact.
- F. Lattice, monopole, guyed or other freestanding support structures, antennas and associated enclosures and all exterior mechanical equipment shall not be illuminated except as required by the Oregon State Aeronautics Division or the Federal Aviation Administration.
- G. Lattice, monopole, guyed or other freestanding support structures up to 70 feet in height shall have provisions that will allow for co-location of at least one additional user or wireless communication provider. Support structures exceeding 70 feet in height shall have provisions that will allow for co-location of at least two additional users or wireless communication providers.
- H. A permittee shall cooperate with other wireless communication providers and others in co-locating additional antennas on support structures. A permittee shall exercise good faith in co-locating with other providers and sharing the permitted site, provided such shared use does not result in substantial technical impairment of the ability to provide the permitted use (i.e., a significant interference in broadcast or reception capabilities as opposed to a competitive conflict or financial burden). Good faith shall include sharing technical information sufficient to evaluate the feasibility of co-location.

In the event a dispute arises as to whether a permittee has exercised good faith in accommodating other users, the county may require a third party technical study at the expense of either or both the applicant and permittee.
- I. Failure to comply with the co-location requirements of this section may result in the denial of a permit request or revocation of an existing permit.
- J. Lattice, monopole, guyed or other freestanding support structure and equipment enclosure shall be removed by the facility owner or property owner within six months of the date it ceases to be operational.

Findings: In the absence of specific objections and the absence of a response by Appellant to items B, C, D, E, F, G, H, I, and J, the Hearings Officer accepts and adopts the Proposed

Findings and Conclusions presented by Applicant in the Day Management Corporation's Post-Hearing Statement and Supplement to Open Record, IV, pages 9 thru 12.

Applicant has met its burden of establishing the standards and criteria for the Application.

The Applicant is requesting a variance from the permitted 150 foot standard for communication facilities to a height of 300 feet.

MCC 17.122.020 sets forth the requirements for a variance.

A. The director, planning commission, hearings officer, or board may permit and authorize a variance when it appears from the application and the facts presented that:

1. There are unnecessary, unreasonable hardships or practical difficulties which can be relieved only by modifying the literal requirements of this title; and

The Hearings Officer finds by substantial evidence;

1. That the practical difficulties of achieving a 97% reliability coverage standard with sufficient audio quality cannot be achieved using an allowed 150 foot tower and that in order to achieve the required 97% reliability and audio quality a tower of at least 300 feet is required.

2. That co-location using the existing 320 foot tower at the site was considered, however the operator of the potential co-location tower was not responsive to or effective in providing information required in order to advance the project.

3. That without a co-location option at the site the project required the construction of a tower of sufficient height to provide the necessary reliability of coverage and audio quality.

4. That the public health, safety and general welfare will benefit from coordinated first responder communications.

2. There are unusual circumstances or conditions applying to the land, buildings, or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings, or uses in the same zone; however, nonconforming land uses or structures in the vicinity or violations of land use regulations or standards on the subject property shall not in themselves constitute such circumstances or conditions; and

3. The degree of variance from the standard is the minimum necessary to permit development of the property for the proposed use; and

The Hearings Officer finds by substantial evidence;

1. That the city of Salem in developing its project to replace an aging and diverse communication system with a consolidated first responder communication system to serve a wide area to include Marion and Polk Counties identified the site location as the best location to provide the maximum coverage.

2. That the project identified that to attain the maximum coverage a tower with a height of 300 feet was optimal. A shorter tower would be insufficient to provide the necessary coverage.

3. That an existing 320 foot tower at the site location was a viable option versus construction of a new tower. However, questions and concerns were raised by radio engineers regarding the

structural integrity of the existing tower to effectively and efficiently handle the equipment needed by the communication system.

4. That the operator of the existing tower did not provide the requested information in a reasonable time.

5. Construction of a new tower of sufficient height then became the priority.

4. The variance will not have a significant adverse effect on property or improvements in the neighborhood of the subject property; and

The Hearings Officer finds by substantial evidence;

1. That the site location currently has nine communication towers of varying heights operated by several companies and lessees. The site is located within existing farm land that is under cultivation.

2. There are no residences or other structures within 1,000 feet of the site.

5. The variance will not have a significant adverse effect upon the health or safety of persons working or residing in the vicinity; and

See findings under No. 4 above.

6. The variance will maintain the intent and purpose of the provision being varied.

There is no statement of intent and purpose in this section of MCC 17.125.120. Review of the items required to be included for approval of the application show that some standard of visual aesthetic is to be considered together with a minimization of structures through co-location, and an attention to structural and other safety considerations, including air traffic.

The Applicant has met its burden in establishing the need for the proposed tower, meeting the aesthetic considerations and compliance with the safety criteria, including approval by government authority.

Additionally, the site location is within a P (Public) zone.

MCC 17.171.010 Purpose.

The purpose and intent of the P (public) zone is to provide regulations governing the development of lands appropriate for specific public and semi-public uses and to ensure their compatibility with adjacent uses. It is intended that this zone be applied to individual parcels shown to be an appropriate location for a certain public or semi-public use.

The proposed communication tower will serve the purpose of providing a wide area, coordinated facility for the communications of first responders, police, fire, medical and other personnel, a public purpose.

VI. Order

It is hereby found that applicant has met the burden of proving the applicable standards and criteria for approval of an administrative review application and variance to establish a wireless communication facility on a 300 foot tall tower on a 0.92 acre parcel in a P (Public) zone located at

7050 Skyline Road SE, Salem, Oregon (T8S; R4W; Section 24DC; tax lot 300). Therefore, the administrative review application and variance are **GRANTED**.

Applicant shall comply with all applicable building codes and shall obtain all required permits and licenses.

VII. Other Permits

The applicant herein is advised that the use of the property proposed in this application may require additional permits from other local, state or federal agencies. The Marion County land use review and approval process does not take the place of, or relieve the applicant of responsibility for, acquiring such other permits, or satisfy any restrictions or conditions thereon. The land use permit approved herein does not remove, alter or impair in any way any covenants or restrictions imposed on this property by deed or other instrument.

VIII. Effective Date

The application approved herein shall become effective on the 28th day of April 2018, unless the Marion County Board of Commissioners, on their own motion or by appeal timely filed, is asked to review this order. In case of Board review, this order shall be stayed and shall be subject to such final action as is taken by the Board.

IX. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 27th day of April 2018. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 12th day of April 2018.




Roy Daniel
Marion County Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

Neil Olsen 5 Centerpointe Dr. Ste 220 Lake Oswego, OR 97035	<u>Agencies Notified</u> Planning Division (via email: lmilliman@co.marion.or.us) (via email: gfennimore@co.marion.or.us)
Dean Ballew 4700 SE International Way Milwaukie, OR 97222	Public Works Engineering (via email: jrasmussen@co.marion.or.us)
Peter Dinsdale 7455 Skyline Rd Salem, OR 97306	Building Inspection (via email: deubanks@co.marion.or.us) Assessor's Office (via email: assessor@co.marion.or.us) Environmental Services (via email: mpuntney@co.marion.or.us) AAC Member No. 1
Allen Dannen 555 Liberty St SE Rm 325 Salem, OR 97301	Aileen Kaye 10095 Parrish Gap Rd SE Turner, OR 97392
Jill Foster Churchill Leonard PO Box 804 Salem, OR 97308	Laurel Hines 10371 Lake Dr SE Salem, OR 97306

by mailing to them copies thereof, except as specified above for agency notifications. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited in the United States Mail at Salem, Oregon on the 10th day of April 2018, and that the postage thereon was prepaid.



Joanna Ritchie
Secretary to Hearings Officer