

**BEFORE the HEARING EXAMINER for the
CITY of MERCER ISLAND**

DECISION

FILE NUMBER: CUP23-002

APPLICANT: City of Mercer Island, Public Works Department
ATTN: Alaine Sommargren
9601 SE 36th Street
Mercer Island, WA 98040

TYPE OF CASE: Conditional Use Permit for an Essential Public Facility: Water supply system Advanced Metering Infrastructure – Site 3

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: APPROVE subject to conditions

DATE OF DECISION: May 20, 2024

INTRODUCTION ¹

The City of Mercer Island (“City”) Public Works Department (“Public Works”) seeks approval of a Conditional Use Permit (“CUP”) for an Essential Public Facility (“EPF”): Water supply system Advanced Metering Infrastructure (“AMI”) – Site 3.

Public Works filed the CUP application on December 15, 2023. (Exhibit 2 ²) The Mercer Island Department of Community Planning & Development (“CP&D”) deemed the application complete on December 29, 2023. (Exhibit 4)

The subject property is located at 5701 Island Crest Way, within Island Crest Park. Its Assessor’s Parcel Number is 1924059013 (“Site 3”). (Exhibit 1)

The Mercer Island Hearing Examiner (“Examiner”) viewed the subject property via Google Earth imagery: Overhead imagery captured August 21, 2022; Street View imagery captured August 2019 (Park driveway and parking area) and April 2023 (Island Crest Way).

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.
² Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

The Examiner held a remote predecision open record hearing pursuant to MICC 3.40.060 on May 16, 2024, using the “Zoom” platform. The City gave notice of the hearing as required by the MICC. (Exhibit 12)

The following exhibits were entered into the hearing record during the hearing:

- Exhibits 1 - 12: As enumerated in Exhibit 1, the CP&D Staff Report
- Exhibit 13: Annotated aerial photograph – Site 3
- Exhibit 14: Facility schematic – Site 3
- Exhibit 15: Letter from Robert Davis, Principal RF Engineer, Sensus USA
- Exhibit 16: ACS Certification Exhibit

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. The City operates a water service which serves some 7,900 customers, each of which has a water usage meter on its service line. At the current time, approximately 82% of those 7,900 meters are “read” manually bi-monthly; the remaining approximately 18% are read remotely by a person driving by a property and obtaining the reading using a hand-held device. The meters are of various vintages and many are near the end of their useful life. Among their “aging” problems, they are under-reading water usage. (Exhibits 1; 2; testimony)
2. In 2018 the City Council (“Council”) authorized a project to explore upgrading the water metering system. Several different systems were studied. The Council subsequently decided to pursue the AMI system and included implementation in the City’s 2021-22 Capital Budget. The Council awarded a bid for installation of the AMI system in 2022. (Testimony)
3. The AMI system consists of two primary components: The water meters; and the base stations. The water meters replace the old, existing meters. Each is equipped with a small, low power transceiver which “broadcasts” hourly water consumption data in short bursts (each only a few seconds long) four to six times a day. (Testimony)

The meters’ transmitter power is about 2 watts; transmission is essentially line-of-sight, so more than one receiving base station is required to cover the entirety of Mercer Island. Each base station consists of two components, a small aluminum box (22” W x 22” H x 10.5” D) containing the transceiver equipment; and a whip antenna (approximately 9 feet tall and 1.5” in diameter). (Exhibits 1; 2; 14) The transceiver equipment meets all applicable FCC requirements. (Exhibits 15; 16)

4. Ideally, the signal from a meter will be received by at least two base stations. In order to determine the optimal base station locations, a signal propagation (coverage) study was performed which identified seven locations on the Island. Strong opposition from the public was expressed about two

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of the seven locations. Public Works asked its consultant to eliminate those two locations and re-run the coverage study to identify alternative locations. That analysis resulted in the identification of six optimal locations. Site 3 is an original as well as a second round site. (Testimony)

Approximately 40% of the new meters have been installed. The AMI base station equipment was installed at Site 3 before Public Works realized that a CUP was required. The equipment has not been activated pending the outcome of this proceeding. (Testimony)

5. Site 3 is on the west side of the southern ball field in Island Crest Park. The antenna and the control box are attached to one of the existing 80-foot tall field light poles along the first base line. The antenna is attached at the top of the pole; the control box is attached about 5 feet above ground level. In addition to the AMI facilities, an existing wireless communication facility (“WCF”) antenna tower is located on the east side of the Park near the park entrance and a second WCF antenna array is attached to a different pole near the southeast corner of the southern ball field. (Exhibits 2; 13; 14; testimony; Google Earth Street View imagery)
6. A small area designated as geologically hazardous and two streams with their buffers are located on Site 3 to the west of the ball fields and their parking area. (Exhibit 13) No alteration of the physical site will occur: The antenna is at the top of an existing field light pole; the control box is attached to the same pole. Even if critical areas regulations applied, the installation would be exempt from critical areas requirements as a minor expansion of a public utility facility. [MICC 19.07.120(D)(2)]
7. Site 3 is in an area zoned R-9.6. (Exhibits 1; 10) Public utility facilities are a listed conditional use in all residential zones subject to three requirements. [MICC 19.02.010(C)(1)(a) – (c)] The three requirements (at least a 20-foot setback from abutting properties; off-street parking based on the square footage of the building; and shielding landscaping) are all met at Site 3: The the field light pole is more than 20 feet from the nearest property boundary; there is no building area to need parking for; the existing trees on site screen the facilities from off-site visibility. The whip antenna on top of the field light pole will likely not be noticed by baseball players. (Exhibit 10)

However, the needed height of the antenna in order to achieve the necessary areal coverage exceeds the normal MICC height limit for WCFs. Since the antenna height is needed for successful operation of the AMI system in parts of Mercer Island, the facility must be treated as an EPF. Local regulations cannot prohibit the location of an EPF. [MICC 19.06.100(A)(2)]

8. Mercer Island’s State Environmental Policy Act (“SEPA”) Responsible Official issued a threshold Determination of Nonsignificance (“DNS”) for AMI - Site 3 on February 26, 2024. (Exhibit 11) The DNS was not appealed. (Testimony)
9. The record contains one public comment. Sarah Fletcher (“Fletcher”) expressed a philosophical objection to cell towers in any City park and to the AMI metering system in general. (Exhibit 8)

10. CP&D has evaluated the application for compliance with both CUP approval criteria and EPF compliance items.³ (Exhibit 1, PDF 5 – 8) CP&D concludes that the proposal complies with all applicable criteria and recommends approval subject to six conditions. (Exhibit 1, PDF 8 & 9)

Public Works did not object to CP&D’s analysis or its recommended conditions.

11. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK⁴

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

A CUP is a Type IV application. The Examiner conducts an open record hearing and renders a final decision on Type IV applications which is subject to the right of reconsideration and appeal to Superior Court. [MICC 19.15.030(E), Tables A and B; MICC 19.15.140; Chapter 3.40 MICC]

The Examiner may “1. Approve; 2. Conditionally approve; 3. Continue the hearing; 4. Remand the application to staff; or 5. Deny the application.” [MICC 19.15.140(C)]

Review Criteria

The review criteria for a CUP application depend upon the zone in which the subject property is located. For sites not located in Town Center, the criteria are set forth at MICC 19.06.110(A)(2):

- a. The permit is consistent with the regulations applicable to the zone in which the lot is located;
- b. The proposed use is determined to be acceptable in terms of size and location of site, nature of the proposed uses, character of surrounding development, traffic capacities of adjacent streets, environmental factors, size of proposed buildings, and density;
- c. The use is consistent with policies and provisions of the comprehensive plan; and
- d. Conditions shall be attached to the permit assuring that the use is compatible with other existing and potential uses within the same general area and that the use shall not constitute a nuisance.

³ The CP&D Staff Report (Exhibit 1) contains several inadvertent scrivener’s errors which were noted and orally corrected during the hearing. The site description at PDF 2 and 7 is of Site 4, not Site 3; the statement at PDF 2 about the AMI control box location on the site is for Site 4, not Site 3; and the percentage of the existing water meters read remotely at PDF 5 should be 18%, not 28%. (Testimony)

⁴ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

Additional review criteria apply to government services, public facilities, utilities, and museums and art exhibitions located in single-family residential zones:

- a. All structures shall be located at least 20 feet from any abutting property;
- b. Off-street parking shall be established and maintained at a minimum ratio of one parking space for each 200 square feet of gross floor area; and
- c. Utilities shall be shielded from abutting properties and streets by a sight obscuring protective strip of trees or shrubs.

Special considerations for EPFs are set forth at MICC 19.06.100(D):

... [R]egardless of the proposed location of the EPF, materials showing compliance with the following items must be submitted:

1. *Documentation of need.* The applicant must demonstrate the need for the proposed EPF. Included in the analysis of need should be the projected service population, an inventory of existing and planned comparable facilities and projected demand for this type of essential public facility.
2. *Consistency with applicant's plans.* The proposal shall be consistent with the applicant's own long-range plans for facilities and operations.
3. *Consistency with Mercer Island Comprehensive Plan.* The proposal shall be consistent with the Mercer Island Comprehensive Plan.
4. *Minimum site requirements.* The applicant shall submit documentation showing the minimum siting requirements for the proposed facility. Site requirements may be determined by the following factors: minimum size of the facility, access, support facilities, topography, geology, and mitigation needs. The applicant shall also identify future expansion needs of the facility.
5. *Alternative site selection.* The applicant shall search for and investigate alternative sites before submitting a proposal for conditional use permit approval. The proposal shall indicate whether any alternative sites have been identified that meet the minimum site requirements of the facility.
6. *Proposed impact mitigation.* The proposal must include adequate, appropriate and reasonable mitigation measures for the impacted area(s) and community. Mitigation measures may include, but are not limited to, natural features that will be preserved or created to serve as buffers, other site design elements used in the development plan, and/or operational or other programmatic measures contained in the proposal.

The proposed measures shall be adequate to substantially reduce or compensate for anticipated adverse impacts created by the proposed facility.

(Italics in original)

Vested Rights

“Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191 (2014), *review denied*, 182 Wn.2d 1004, 342 P.3d (2015)]

The City has adopted local regulations governing vesting of land use applications.

Complete applications for land use review of Type I land use reviews, building permits, conditional use permits, design review, short subdivisions and long subdivisions, shall vest on the date a complete application is filed. The department’s issuance of a letter of completion for Type III and IV land use decisions, as provided in this chapter, or the failure of the department to provide such a letter as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[MICC 19.15.170(B)] The vesting date of the AMI-Site 4 application is December 29, 2023.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [MICC 19.15.060(A)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. Fletcher’s objections are philosophical. Fletcher does not allege non-compliance with any CUP approval criteria nor does Fletcher allege any failure to provide the required EPF-support information. Fletcher’s objections raise legislative issues which are legally beyond the jurisdiction of a hearing examiner to consider. In addition, although there are already two WCF cell towers elsewhere in Island Crest Park, the AMI-Site 3 proposal is not adding another. From a visual perspective, it is adding a 9-foot tall, 1.5” diameter whip antenna on top of an existing 80-foot tall field light pole at the top of which is an array of (at least) six large field lights. (Exhibit 14) The dominant feature of the pole is the field light array, not the whip antenna.
2. Detailed exposition of compliance with approval criteria is unnecessary as this is essentially an uncontested application. Recitation of CP&D’s report text is also not needed. CP&D’s analysis is appropriate and thorough. As such, it is incorporated herein by reference as if set forth in full.

3. The recommended conditions of approval as set forth in Exhibit 1 are reasonable, supported by the evidence, and capable of accomplishment with the following changes:
 - A. When a permit involves a specific plan for development of a site, the Examiner believes it necessary to include a specific reference to the approved plan(s) in the conditions. In this case there is a plan which identifies the specific pole on which the AMI equipment has been placed (Exhibit 7) and a schematic which shows how the equipment is attached to the pole (Exhibit 14) The Examiner will modify Recommended Condition 1 to also include reference to Exhibit 14.
 - B. The Examiner believes that the ,word “applicant” is generally no longer appropriate after a permit has been issued. A word such as “permittee,” “developer,” or “plattor,” depending on the context, is usually preferable because “applicant” is often interpreted as applying only to the original permit applicant. Since land use permits run with the land, the eventual developer may not always be the same party as the original applicant. Since this is a City project, that situation is highly unlikely. Nevertheless, the Examiner will substitute “Permittee” for “applicant” in Recommended Condition 2.
 - C. A few minor, non-substantive structure, grammar, and/or punctuation revisions to Recommended Conditions 1, 5, and 6 will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.
4. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner’s site view, the Examiner **GRANTS** the requested Conditional Use Permit for AMI – Site 3 **SUBJECT TO THE ATTACHED CONDITIONS**.

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John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ⁵

Alaine Sommargren
Ryan Harriman

Molly McGuire

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Department of Community Planning & Development a written request for reconsideration within ten calendar days following the issuance of this Decision in accordance with the procedures of MICC 3.40.110. Any request for reconsideration must allege one or more of the following errors: “1. The decision was based in whole or in part on erroneous facts or information; 2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or 3. An error of procedure occurred that prevented consideration of the interests of persons directly affected by the decision.” [MICC 3.40.110(A)] See MICC 3.40.110 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

“Any judicial appeal of the hearing examiner’s decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act (‘LUPA’). The land use petition must be filed within 21 days of the issuance of the hearing examiner’s decision.” [MICC 3.40.100, ¶ 2]

The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”

CONDITIONS OF APPROVAL CUP23-001 ADVANCED METERING INFRASTRUCTURE – SITE 3

This Conditional Use Permit for an Essential Public Facility is subject to compliance with all applicable provisions, requirements, and standards of the Mercer Island City Code, standards adopted pursuant thereto, and the following special conditions:

1. The project shall be in substantial conformance with Exhibits 7 and 14 and all applicable development standards contained within Mercer Island City Code (“MICC”) Title 19.

⁵ The official Parties of Record register is maintained by the City’s Hearing Clerk.

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2. The Permittee shall obtain any permits from state and federal agencies that are applicable to this project. The Permittee is also responsible for documenting any required changes in the project proposal due to conditions imposed by any applicable local, state, and federal government agencies.
3. A City of Mercer Island Building Permit may be required for construction of this project proposal.
4. Construction of this project proposal shall only occur during approved construction hours by the City of Mercer Island and/or as otherwise restricted by the Building Official.
5. Pursuant to MICC 19.15.200, revisions that result in substantial changes, as determined by the code official, shall be treated as a new application for purposes of vesting. For the purposes of this section, "substantial change" includes the creation of additional lots, the elimination of open space, substantial changes in access, or changes to conditions of approval. Additionally, the need for the modification was not known and could not have been reasonably known before the approval was granted.
6. Pursuant to MICC 19.15.150, land use review approvals shall expire three years from the date of notice of decision if the development proposal authorized by the land use review is not commenced. For the purposes of this section, the development proposal shall be considered established if construction or substantial progress toward construction of a development proposal for which a land use review approval has been granted must be undertaken within two years of the date of notice of decision of the land use review. Where no construction activities are involved, the use or activity shall be commenced within three years of the date of notice of decision of the land use review