

SPOKANE COUNTY HEARING EXAMINER

Application for Setback Variance, for a Wireless)
Communication Support Tower; in the Rural Traditional)
(RT) zone;)
Applicant: Pass Word, Inc.)
File No. VN-04-18)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION**

I. SUMMARY OF DECISION:

Hearing Matter: Application for setback variance, in the RT zone; to allow a 150 foot high wireless communication support tower at a setback of 50.9 feet from the south property line of the subject property.

Summary of Decision: Variance application is *granted with the stated conditions*.

II. FINDINGS AND CONCLUSIONS:

Procedural Matters:

On December 4, 2018, the applicant, Pass Word, Inc., submitted an application for a variance to the Spokane County Building and Planning Department (“Department”), in the above-entitled file, to allow a wireless communication support tower to be constructed to a height of 150 feet and setback 50.9 feet from the south property line, rather than the required setback of 130 feet, on a 20.1-acre parcel of land (“site”); in the Rural Traditional (RT) zone of the Spokane County Zoning Code (“Zoning Code”).

The site is referenced as County Assessor’s tax parcel no. 49313.9019, with the address of 33810 N. Waldron Lane, Chattaroy, WA 99003. The site is situated in the unincorporated area of Spokane County, Washington; and is located approximately one (1) mile east of Hardesty Road, and one (1) mile south of the intersection of Waldron Lane and Milan-Elk Road. The legal description of the site is: the W ½ of the SW ¼ of the SW ¼ of Section 31, Township 29N, Range 44 EWM of Spokane County, Washington.

The staff report prepared by the Department (“staff report”), on page 1, erroneously locates the site in “Township 25” of Spokane County, instead of Township 29.

Pass Word, Inc., reports its mailing address as: c/o Rodney Bacon, 1303 W. 1st Avenue, Spokane, Washington 99201. The site owner is Jerry L. Atterberg, at a mailing address of 13005 E. Blossey, Spokane, WA 99216.

Variance applications are exempt from compliance with the State Environmental Policy Act (SEPA) and the County Environmental Ordinance, pursuant to Section 197-11-800(6)(b) of the Washington Administrative Code (WAC); unless part of a project that requires environmental review.

A Notice of Hearing regarding this application was mailed to the required individuals and property owners on February 21, 2019 and said Notice of Hearing was also posted at the site on March 4th, 2019, both by Rodney Bacon. See Declaration of Mailing and Declaration of Posting, signed by Rodney Bacon on February 21, 2019 and March 18, 2019 respectively. The notice requirements for the public hearing,

set forth in Chapter 13.700 of the Spokane County Code (SCC), were met by the applicant and the Department, respectively.

On March 20, 2019, the Hearing Examiner conducted a public hearing on the application.

The Hearing Examiner heard the application pursuant to SCC Chapter 1.46 (Hearing Examiner Ordinance); the County Hearing Examiner Rules of Procedure, adopted by County Resolution No. 96-0294; and Chapter 14.406 (Variance) of the Spokane County Zoning Code (“Zoning Code”).

The following persons testified at the hearing, under an oath administered by the Hearing Examiner:

Tammy Jones
County Building and Planning Department
1026 W. Broadway Avenue
Spokane, WA 99260

Rodney Bacon
Pass Word, Inc.
1303 W. 1st Avenue
Spokane, WA 99201

Jerry L. Atterberg
13005 E. Blossey
Spokane, WA 99216

Taudd Hume, Attorney at Law
Parsons, Burnett, Bjordahl, Hume LLP
Steam Plant Square, Suite 225
159 S. Lincoln
Spokane, WA 99201

The following exhibits were offered and admitted into evidence at the hearing:

- Exhibit 1: Building and Planning File No.: VN-04-18
- Exhibit 2: Staff Report to Hearing Examiner – File #: VN-04-18
- Exhibit 3: Letter from Parsons, Burnett, Bjordahl, Hume LLP, Dated March 20, 2019
- Exhibit 4: USGS Topographic Map of Milan Hill
- Exhibit 5: Diagram of Site and Requested Location of Tower
- Exhibit 6: Milan Hill SCOUT Map (Google Map)
- Exhibit 7: Milan Hill Terrain – Facing north (Google Map)
- Exhibit 8: Milan Hill Terrain (Google Map)
- Exhibit 9: Milan Hill Satellite View (Google Map)
- Exhibit 10: Photo of partially assembled tower
- Exhibit 11: Photo of partially assemble base of tower

The Hearing Examiner takes notice of the Spokane County Comprehensive Plan (“Comprehensive Plan”), the Zoning Code, and the SCC; other applicable development regulations; and past land use decisions for the site and neighboring land in the vicinity.

The record includes the documents in File No. VN-04-18 at the time of the hearing, the electronic recording of the hearing by Hearing Examiner staff, Exhibits 1 - 10, the sign-in sheet for the hearing, and the items taken notice of by the Hearing Examiner.

Description of Site, Adoption of Interim Zoning Ordinance, Installation of Wireless Tower:

The site is 20.1 acres in size and rectangular-in-shape; and is undeveloped, except for a partially constructed wireless communication support tower located approximately 50.9 feet from the middle of the south property line of the site.

The site is located at the top of Milan Hill, an elevated geologic feature in the area, and is accessed from Waldron's Lane, an unpaved private road that meanders northerly for some distance to Milan-Elk Road. The constructed portion of the tower is located on a high spot on the site. The site ranges from hilly to relatively steep in topography, is heavily covered with numerous rock outcrops, and is wooded with Ponderosa pine trees and other native vegetation.

The site plan submitted for the variance application ("site plan"), prepared on September 8, 2016, is entitled "Milan Hill Tower As-Built Setback Exhibit". The site plan illustrates the site, driveway access to the existing tower from the north, and the location of the existing tower. The site plan shows the tower with a setback of 50.9 feet from the south property line. The site plan also illustrates the topography of the site in 1-foot contours, and the location of the tower at a high spot on the site.

An application for variance regarding the location of a wireless communication tower on the subject site was previously submitted to the Building and Planning Department on August 17, 2017. That application was considered by the Building and Planning Department and a public hearing was held by the Spokane County Hearing Examiner on December 6, 2017 regarding the application. The decision of the Hearing Examiner at that time was that to be approved the proposed project required a Conditional User Permit that had not been applied for by the applicant. Thus, the application for variance was denied without prejudice, meaning that the applicant could re-apply for a variance pursuant to the applicable codes and regulations at the time of the application. See Findings of Fact, Conclusions of Law, and Decision, File No.: VN-02-17, dated December 29, 2017, signed by Michael C. Dempsey, Spokane County Hearing Examiner.

On May 7, 2018, the Board of County Commissioners of Spokane County ("Board of County Commissioners") adopted Spokane County Resolution No. 18-0343, adopting an Interim Zoning Ordinance, Section 14.822 of the Spokane County Zoning Code, to expedite the siting of wireless communication facilities funded by federal assistance through the U.S. Department of Agriculture's Rural Utilities Services Broadband Initiatives Program (BIP); in the Rural and Resource Lands zones of the Zoning Code.

The Interim Zoning Ordinance allowed wireless communication facilities as an outright permitted use in the Rural and Resource Lands zones, provided that the wireless tower has received federal assistance through the US Department of Agriculture's (USDA) Rural Utilities Services (RUS), Broadband Initiative Program (BIP). On June 26, 2018, the Board of County Commissioners affirmed the Interim Zoning Ordinance by Resolution No. 18-0470 and extended the effective date of the Interim Zoning Ordinance for a period of six (6) months to December 26, 2018.

The application for variance having been submitted on December 4, 2018, it was timely submitted and vested for review under the then effective Interim Zoning Ordinance adopted and extended under Resolutions Nos. 18-0343 and 18-0470.

Consistency of Project with Zoning Code and Variance Criteria:

Pursuant to SCZC 14.822.210 and SCZC 14.822.220(3) as amended by Resolutions 18-0343 and 18-0470, a Federally Assisted wireless communication support tower is a permitted use in the RT zone, subject to the processing of the application by the Department, and the approval of the application by the Hearing Examiner after a public hearing.

The Spokane County Comprehensive Plan, Rural Traditional designation does not address wireless communications facilities. Notwithstanding, the Spokane County Zoning Code does address the location and installation of wireless communications facilities. The allowance of the existing tower on the site is subject to compliance with all the development regulations for a wireless communication support tower set forth in SCZC 14.822.220(3) and SCZC 14.822.300 in effect on December 4, 2018, the date of submission of the application for variance.

The SCZC recognizes that relief from certain requirements may be allowed when strict application of the SCZC causes practical difficulties regarding the use of property. *See* SCZC 14.406.000. When such circumstances exist, a property owner may qualify for a “variance” from the SCZC requirements. In order for a variance request to receive approval, the applicants must demonstrate compliance with all of the following criteria:

- a. *Because of special circumstances applicable to the subject property, including size, shape, topography, location, or surroundings, the strict application of the SCZC deprives the property of rights and privileges enjoyed by other properties in the vicinity and under the same zone classification.*
- b. *The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated.*
- c. *The granting of the variance will not constitute a grant of special privilege inconsistent with the limitations upon other properties in the vicinity and zone in which the property is situated.*
- d. *The granting of the variance is consistent with the Comprehensive Plan.*

See SCZC 14.406.100(1)(a)-(d).

Regarding the first criterion, the Hearing Examiner concludes that there are special circumstances applicable to this property that make strict application of the zoning code problematic. The chief characteristic of the property, as relevant here, is the challenging topography.

The wireless communications support tower for which the variance is sought, requires that it be located such as to have “line of sight” accessibility to the area that it is intended to serve. Exhibit 3, and Testimony of Rodney Bacon. The topography and forestation of the property limits the location of the wireless communications tower to the proposed site of the tower, with a setback of only 50.9 feet from the southern border of the site. This is a point that is the highest location on the subject site and the only point that permits the maximum effectiveness of the tower. Testimony of Rodney Bacon.

In the absence of any comment from agencies or the public regarding the topographic limitations on the location of the proposed tower, Mr. Bacon's testimony and illustrations in Exhibit 3 are sufficient to support a conclusion that a strict application of the zoning code on the setback would prevent the location of the tower on the proposed site. Under the circumstances of this case, the Hearing Examiner concludes that the topography constitutes a "special circumstance" that justifies the granting of a variance.

The second criterion provides that the variance should not be granted if it will be materially detrimental to the public welfare or injurious to other properties or improvements in the vicinity and zone. The applicant is proposing to reduce the setbacks from 130 feet to 50.9 feet from the south border of the subject property. There was no evidence that a reduced setback in this location will cause any material detriment to the public or would cause damage to any neighboring property owner. The Hearing Examiner concludes that this criterion is satisfied.

The third criterion for a variance states that the granting of the variance will not constitute a grant of special privilege inconsistent with the limitations on other properties in the vicinity and zone.

The variance requested in this case is considered an "area variance," i.e. the request seeks relief from a dimensional requirement such as a setback, yard size, lot coverage, or height restriction. *See Hoberg v. City of Bellevue*, 76 Wn.App. 357, 360, 884 P.2d 1339 (1994). This type of variance is to be distinguished from a "use variance," which seeks to permit a use that otherwise is inconsistent with the zoning classification. *See id.* In this case, a deviation from the setback restriction is not a "special privilege" because the proposed use of the property, i.e. wireless communication facilities, is outright permitted in the RT zone. The applicant is only seeking relief from a dimensional standard; not asking to change the allowed use of the property. *See id.* As a result, no "special privilege" is being sought by this application. *See id.* The Hearing Examiner concludes that that the requested variance does not result in conferring a "special privilege" upon the applicants, as that term is interpreted in Washington case law.

The final criterion for approval of variance states that the variance must be consistent with the Comprehensive Plan. The Hearing Examiner concludes that this criterion is satisfied. The property is designated as Rural Traditional under the Comprehensive Plan. Wireless communication facilities, including support towers, is a use allowed on Rural Traditional Land. The variance request does not change the nature of the proposed use. In addition, the goals and policies of the Rural Land Use Chapter of the Comprehensive Plan do not address variance requests. Because the proposed use is consistent with the Comprehensive Plan, and there are no specific limitations for a variance under these circumstances, the Hearing Examiner concludes that this criterion is satisfied.

In addition to the mandatory criteria that must be fulfilled in order to approve a variance, the SCZC also lists certain circumstances under which a variance should not be allowed. According to these guidelines, a variance *should not*:

- a. *Be based upon the precedent established by illegal or nonconforming circumstances.*
- b. *Establish a precedent that will adversely affect the zoning concept for the land in the area or the County as a whole.*
- c. *Be based upon a lack of reasonable economic return or a claim that the existing structure is too small.*
- d. *Result in a de facto zone reclassification.*

- e. *Permit the establishment of a use otherwise prohibited in the zone in which the property is located.*

See SCZC 14.406.100(2)(a)-(e). The Hearing Examiner finds that the proposed variance does not transgress these standards, for the reasons that follow.

The variance is not based upon a precedent established by illegal or nonconforming conditions. See SCZC 14.406.100(2)(a). The applicant is not relying upon an illegal condition or a nonconforming situation as a justification for a variance from the SCZC. The need for the variance, rather, arises from the challenging topography. This is a natural condition of the land that materially limits the location of the proposed tower on the property. It is true that the requested setback does not meet the setback requirements of the current SCZC. The proper question, then, is whether a variance is appropriate for this lot. From this perspective, it is clear that a variance is appropriate based upon the topography of the site and the location of the tower being at the highest point on the property.

The granting of a variance in this case does not establish a precedent that undermines the zoning concept for the area or the County as a whole. See SCZC 14.406.100(2)(b). The properties in the immediate vicinity all appear to have varying topography and similar geographic make up as the subject property. The variance does not alter these realities one way or the other. The variance merely allows the subject property to accommodate an allowed use. Wireless communications facilities are explicitly allowed in the RT zone. See Spokane County Resolution Nos. 18-0343 and 18-0470. As a result, approval of the variance does not set a bad precedent from a land use perspective. Nor does the variance allow a use that is otherwise prohibited by the existing zoning. See SCZC 14.406.100(2)(e).

The applicants did not request the variance merely to bolster the return on their investment. See SCZC 14.406.100(2)(c). As stated previously, the variance is being sought because the topography presents unique challenges to the location of the tower on the property.

Finally, the variance does not result in a “de facto” rezone of the property. See SCZC 14.406.100(2)(d). A “de facto” rezone would occur if granting the variance would, in effect, allow uses that were otherwise prohibited in the existing zone. Here, the applicants are proposing to construct a wireless communication support tower, a use which is explicitly permitted in the zone. The variance only provides relief from one of the dimensional requirements, specifically the setback. It does not treat the property as if it had a different, more project-friendly classification, in order to justify approval the proposed use.

The variance application for the wireless communication support tower should be approved subject to the below stated conditions.

Any finding of fact above that is a conclusion of law is deemed a conclusion of law. Any conclusion of law above that is a finding of fact is deemed a finding of fact.

Based on the above findings of fact and conclusions of law, the Hearing Examiner enters the following:

III. DECISION:

Based on the Findings and Conclusions above, the application for a variance to allow for a reduction in the setback from 130 feet to 50.9 feet from the property boundary on a parcel in the RT zone

pursuant to SCZC Section 14.822.220(3) is hereby granted, subject to compliance with the conditions of the various agencies specified below.

Any conditions of approval of public agencies that have been added or significantly altered by the Examiner are *italicized*. This approval does not waive the applicants' obligation to comply with all other requirements of other public agencies with jurisdiction over land development.

Minor revisions were made to the conditions of approval to ensure proper formatting, clarity, and consistency with the findings of fact above.

A. Conditions of Approval:

Spokane County Building and Planning Department:

1. All conditions imposed by the Hearing Examiner shall be binding on the "Applicant," which term shall include the owner, owners, *or developers* of the property, heirs, assigns and successors. The Variance applies to Assessor's Parcel No. 49313.9019.
2. The proposal shall comply with provisions of the Rural Traditional (RT) zone, except for the deviation permitted to the required setback from the south property line and shall comply with all other applicable chapters of the SCZC, as amended.
3. The applicant shall develop subject property in substantial conformance to the site plan of record date stamped December 4, 2018.
4. The Department shall prepare and record, with the Spokane County Auditor, a Title Notice noting that the property in question is subject to a variety of special conditions imposed as a result of an approved land use action. The Title Notice shall serve as public notice of the conditions of approval affecting the property in question. The Title Notice should be recorded within the same time frame as allowed for an appeal and shall only be released, in full or part, by the Department of Building and Planning. The Title Notice shall generally provide the following:

"The parcel legally described as *[insert legal description]* is the subject of a land use action by a Spokane County Hearing Examiner on *[insert date]*, imposing a variety of special development conditions. File VE-02-18 is available for inspection and copying in the Department of Building and Planning."
5. Development of the site shall comply with the Spokane County Critical Areas Ordinance (CAO), as amended.
6. Development of the site shall be consistent with the Geo-Hazard Evaluation dated August 14, 2017.
7. The applicant should contact the Department of Building and Planning Permit Center at the earliest possible stage in order to be informed of code requirements administered/enforced as authorized by the State Building Code Act. Design/development concerns include addressing,

grading, fire apparatus access roads, fire hydrant flow, approved water systems, building accessibility, construction type, occupancy classification, existing exterior wall protection and energy code requirement.

Spokane County Public Works:

Prior to release of a building permit or use of property as proposed:

1. Applicant shall submit for acceptance by the Spokane County Engineer read, drainage and access plans.
2. Roadway standards, typical roadway sections and drainage plan requirements are found in Spokane Board of County Commissioners resolution 17-1076 as amended and are applicable to this proposal.
3. Approach Permits are required for any access to the Spokane County road system.
4. Prior to the release of a building permit or issuance of an approach permit, the applicant must submit road and drainage plans to the Spokane County Engineer Department for review and approval. Road and drainage plans must be prepared in compliance with the Spokane County Road and Drainage Standards.
5. The applicant is advised that there may exist utilities either underground or overhead affecting the applicant's property, including property to be dedicated or set aside for future acquisition. Spokane County will assume no financial obligation for adjustments or relocation regarding these utilities. The applicant should contact the applicable utilities regarding responsibility for adjustment or relocation costs and make arrangements for any necessary work.
6. The County Engineer has reviewed this project for transportation concurrency and determined that it is exempt under SCC Section 13.650.104(2)(d)(iv).

DATED this 9th day of April, 2019.

SPOKANE COUNTY HEARING EXAMINER



David W. Hubert, WSBA #16488

NOTICE OF FINAL DECISION AND NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 1.46 (Hearing Examiner) of the Spokane County Code, the decision of the Hearing Examiner on an application for a variance is final and conclusive unless within twenty-one (21) calendar days from the issuance of the Examiner's decision, a party with standing files a land use petition

in Superior Court. Pursuant to RCW Chapter 36.70C, the date of issuance of the Hearing Examiner's decision is three (3) days after it is mailed.

On April 9, 2019, a copy of this Decision will be mailed by certified mail and first class mail to the Applicant, and by e-mail or first class mail to other parties of record. The date of issuance of the Hearing Examiner's decision is April 12, 2019.

THE LAST DAY FOR APPEAL OF THIS DECISION TO SUPERIOR COURT BY LAND USE PETITION IS APRIL 12, 2019.

The complete record in this matter, including this decision, is on file during the appeal period with the Office of the Hearing Examiner, Third Floor, Public Works Building, 1026 West Broadway Avenue, Spokane, Washington, 99260-0245, (509) 477-7490. The file may be inspected Monday - Friday of each week, except holidays, between the hours of 8:00 a.m. and 4:30 p.m. Copies of the documents in the record will be made available at the cost set by Spokane County.

Pursuant to Section 36.70B.130 of the Revised Code of Washington, affected property owners may request a change in valuation for property tax purposes.