

**MEMORANDUM**

**TO:** Charter Review Commission  
**FROM:** Stephen Reinig; Administrative Analyst  
**RE:** Appeals of Hearing Examiner Decisions directly to Superior Court  
**DATE:** July 7, 2006

Issue 35 Appeals of Hearing Examiner go directly to Superior Court will be considered Wednesday July 12. You have received background materials related to the issue. The cost of adding an additional Superior Court Judge was included as that question was raised.

**Fees for Appealing Hearing Examiner Decisions:**

Appeal to County Council	\$500.00
Appeal to Superior Court	\$200.00 plus legal charges

Attached you will find a recent filing in of an appeal of a decision by the County Council. Commissioner Kelly provided this and cites this as an example of why appeals of Hearing Examiner decisions should go directly to Superior Court.

**Change to the Charter**

If the commission agrees to this idea it would appear that section 2.20 would need to be amended.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

CITIZENS TO PRESERVE THE  
UPPER SNOHOMISH RIVER  
VALLEY,  
  
Petitioner,  
  
v.  
  
S-R BROADCASTING; SKOTDAL  
BROS. LLC; and SNOHOMISH  
COUNTY,  
  
Respondents.

NO.  
  
LAND USE PETITION

Pursuant to the Land Use Petition Act, Ch. 36.70C RCW ("LUPA"), Citizens to Preserve the Upper Snohomish River Valley ("CPUSRV"), a Washington nonprofit organization, brings this action to challenge Snohomish County's approval of a Conditional Use Permit ("CUP") to S-R Broadcasting to construct four (4) AM radio antennas in a rural area of the County, the upper Snohomish River Valley ("USRV"). The four antennas are demonstrably incompatible with the USRV and will have a myriad of negative impacts upon the surrounding community and residents that have not been addressed or mitigated by S-R

**Bricklin Newman Doid, LLP**  
Attorneys-at-Law  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
Tel. (206) 264-8600  
Fax (206) 264-9300

1 Broadcasting or the County. The approval of the four antennas fails to comply with the  
2 County's approval requirements and were based upon incomplete and inadequate review  
3 under the State Environmental Policy Act, ch. 43.21C RCW ("SEPA"). Finally, the County  
4 Council and Hearing Examiner committed a number of procedural and substantive errors  
5 in reaching the decisions on appeal. For these reasons, CPUSRV requests the Court to  
6 reverse the County's approval of the proposed antennas.  
7

8 CPUSRV hereby alleges:

9  
10 1. Name and Mailing Address of the Petitioner

11 Petitioner is Citizens to Preserve the Upper Snohomish River Valley, a Washington  
12 nonprofit corporation. Petitioner's mailing address is:

13 Citizens to Preserve the Upper Snohomish River Valley  
14 12820 Old Snohomish-Monroe Road  
15 Snohomish, WA 98290

16 2. Name and Mailing Address of Petitioner's Attorneys

17 Jennifer A. Dold  
18 Bricklin Newman Dold, LLP  
19 1001 Fourth Avenue, Suite 3303  
20 Seattle, WA 98154  
21 (206) 264-8600 telephone  
(206) 264-9300 facsimile

22 3. Name and Mailing Address of the Local Jurisdiction Whose Land Use  
23 Decisions are at Issue

24 Snohomish County  
25 3000 Rockefeller Avenue  
26 Everett, WA

27  
28 **Bricklin Newman Dold, LLP**  
Attorneys-at-Law  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
Tel. (206) 264-8600  
Fax (206) 264-9300

1           4.     Identification of the Decision-Making Body or Officer, Together with a  
2                    Duplicate Copy of the Decisions or, if not a Written Decision, a Summary or  
3                    Brief Description of it

4           CPUSRV herein challenges a number of decisions by the County related to the  
5 proposed antennas. See §§ 4.1-4.6. Because the Snohomish County Hearing Examiner is  
6 the final decision-maker regarding all SEPA review conducted by the County, CPUSRV  
7 challenges the Examiner's SEPA decisions identified herein. Because the County Council  
8 was the final decision-maker regarding the CUP decisions, CPUSRV challenges the  
9 Council's CUP decisions identified herein.  
10

11           4.1     On June 7, 2006, the Snohomish County Council issued a written  
12 decision on Motion 06-248, including findings of fact, conclusions of law, and a decision in  
13 the matter of CPUSRV's appeal of the March 16, 2006 decision by the Snohomish County  
14 Hearing Examiner's approval of a CUP for S-R Broadcasting's proposal. A copy of the  
15 Council's decision is attached as Exhibit A. The June 7, 2006 decision was based in part  
16 upon a previous Council decision, Motion 03-130 (Feb. 26, 2003), attached hereto as Exhibit  
17 B. In turn, Motion 03-130 incorporated some findings from the Hearing Examiner's July  
18 31, 2002 decision denying the CUP, attached hereto as Ex. C.  
19

20           4.2     A July 31, 2002 decision by the Hearing Examiner upholding in part  
21 and denying in part CPUSRV's 2001 appeal of a October 18, 2001 Determination of Non-  
22 Significance ("DNS") originally issued for S-R Broadcasting's proposal. A copy of the  
23 Examiner's decision is attached as Exhibit D. Associated with CPUSRV's appeal of the  
24 DNS, the Hearing Examiner issued two pre-hearing orders erroneously limiting SEPA-  
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1 related issues that he would consider: Order of Partial Summary Dismissal and Eliminating  
2 Accepted Issues of CPUSRV-PAS Appeal (Dec. 24, 2001) and Order Responding to  
3 Appellant Request for Clarification of December 24, 2001 Order of Partial Summary  
4 Dismissal and Eliminating Accepted Issues of CPUSRV-PAS Appeal (Jan. 7, 2002). Copies  
5 of these two decisions are attached hereto as Exhibits E and F.  
6

7 4.3 A November 14, 2002 decision by the Hearing Examiner denying  
8 CPUSRV's motion for partial reconsideration of the Examiner's July 31, 2002 decision. A  
9 copy of that decision is attached as Exhibit G.  
10

11 4.4 An August 17, 2005 decision by the Hearing Examiner denying, in  
12 part, CPUSRV's appeal of the adequacy of the FEIS for S-R Broadcasting's proposal. A  
13 copy of the Examiner's decision is attached as Exhibit H.  
14

15 4.5 An October 4, 2005 decision by the Hearing Examiner denying  
16 CPUSRV's motion for partial reconsideration of the Examiner's August 17, 2005 decision.  
17 A copy of that decision is attached as Exhibit I.

18 4.6 A March 16, 2006 decision by the Hearing Examiner upholding the  
19 February 2006 Addendum and January 2005 Final Environmental Impact Statement  
20 ("FEIS") for the proposed antennas as adequate and approving the CUP pursuant to Council  
21 Motion 03-130. A copy of the Examiner's decision is attached as Exhibit J.  
22

23 5. Identification of Each Person to be Made a Party Under RCW  
24 36.70C.040(2)(b)-(d)

25 Applicant: S-R Broadcasting  
26 2707 Colby Avenue, Suite 1380  
27 Everett, WA 98201  
28

**Bricklin Newman Dold, LLP**  
Attorneys-at-Law  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
Tel. (206) 264-8600  
Fax (206) 264-9300

1 Property Owner: Skotdal Bros. LLC  
2 2707 Colby Avenue, Suite 1418  
3 Everett, WA 98201

4 6. Facts Demonstrating That the Petitioner Has Standing to Seek Judicial  
5 Review Under RCW 36.70C.060

6 6.1 CPUSRV is a non-profit organization registered with the State of  
7 Washington. It is dedicated to comprehensive, coordinated planning and growth in  
8 Snohomish County with special attention to the promotion of wise growth management and  
9 land use, the protection of wildlife, and the prevention of environmental, nuisance, and fiscal  
10 impacts of growth in the USRV.

11 6.2 CPUSRV has members who live adjacent to and near the proposed site  
12 for the antennas and who own and operate farms near the proposed site. CPUSRV also has  
13 members whose properties will directly overlook the site for the proposed antennas. All of  
14 these members will be directly harmed by the proposal. They will view these antennas from  
15 their homes and rural properties and as they travel to and from their homes on local roads  
16 and will be significantly impacted by the inappropriate and negative visual impacts to be  
17 created by the proposed antennas. The proposed antennas also will permanently and  
18 negatively alter the rural character of the area and will harm the members' use and  
19 enjoyment of their homes and rural properties. The tallest proposed antenna with red and  
20 white lights as required by the FAA, will cause light and glare impacts at night to members  
21 who reside near the site. CPUSRV's members also will be injured and prejudiced by the  
22 radio frequency interference ("RFI") impacts caused by the proposed antennas that will  
23 disrupt all forms of computers and electronics in and on the surrounding farms and homes,  
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Bricklin Newman Dold, LLP  
Attorneys-at-Law  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
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Fax (206) 264-9300

1 including farming equipment, computers, telephones, radios, TVS, fax machines, VCRs, and  
2 answering machines. Introduction of these antennas into the views from members' homes  
3 and properties also will negatively decrease the value of members' homes and properties.  
4

5           6.3     The proposed antennas would be constructed in close proximity to the  
6 Snohomish River, a shoreline of statewide significance pursuant to the Shoreline  
7 Management Act, ch. 90.58 RCW, and the Bob Heirman Wildlife Park ("BHWP").  
8 Members of CPUSRV use and enjoy the Snohomish River and BHWP for recreational  
9 purposes. Members boat and fish on the river and fish along its banks, and walk, hike,  
10 picnic, and bird watch in BHWP. Members' use and enjoyment of these areas will be  
11 impacted negatively by the intrusion of the antennas within the landscape.  
12

13           6.4     The Council's and the Hearing Examiner's decisions have prejudiced  
14 or are likely to prejudice both CPUSRV and its members as described in Paragraphs 6.1-6.3,  
15 8.6, 8.11, 8.12, 8.14, and 8.15. The detrimental effect of the proposal on the quality of life  
16 for residents in the area also flies directly in the face of the very purposes of CPUSRV.  
17

18           6.5     The interests of CPUSRV and its members are among those that the  
19 Council was required to consider when making its decisions to approve the CUP and the  
20 Hearing Examiner was required to consider in making his decisions to approve the CUP,  
21 deny in part the DNS and EIS appeals, and uphold, in part, the DNS, the FEIS, and  
22 Addendum. SEPA and the Snohomish County Code ("SCC") were enacted specifically to  
23 protect public health, welfare, safety, and the environment. In the passage of SEPA, for  
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1 example, the Legislature recognized that each person has a fundamental and inalienable right  
2 to a healthful environment and enacted SEPA to protect those rights. See RCW 43.21C.020.

3  
4 6.6 A judgment in favor of CPUSRV would substantially eliminate or  
5 redress the prejudice to the CPUSRV and its members caused by the Council's and Hearing  
6 Examiner's decisions. CPUSRV seeks reversal of the approval of the CUP and a  
7 determination that the DNS (in part), the FEIS (in part) and the Addendum to the FEIS are  
8 inadequate pursuant to the requirements of SEPA. A judgment in CPUSRV's favor would  
9 substantially eliminate and redress the prejudice caused to CPUSRV because it would ensure  
10 that the proposed antennas would be either reviewed and analyzed to the extent required by  
11 SEPA and/or be denied altogether.  
12

13 6.7 CPUSRV has exhausted its administrative remedies to the extent  
14 required by law. The County provided for administrative appeals of the issuance of the DNS  
15 and the FEIS to the Examiner and the issuance of the CUP to the Council. CPUSRV  
16 submitted timely appeals, participated in related hearings, and now files this appeal after  
17 those processes were completed.  
18

19  
20 7. A Separate and Concise Statement of Each Error Alleged to Have Been  
21 Committed

22 7.1 The Examiner's and Council's decisions were based upon unlawful and  
23 *ultra vires* procedures, erroneous interpretations of the law, were not supported by  
24 substantial evidence, constituted a clearly erroneous application of laws to facts, and violated  
25 CPUSRV's constitutional and due process rights for the following reasons.  
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Bricklin Newman Dold, LLP  
Attorneys-at-Law  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
Tel. (206) 264-8600  
Fax (206) 264-9300

1           7.2     The Council and Examiner concluded incorrectly that the proposed  
2 antennas are consistent with the SCC, including SCC chapters 18.72 (CUP review); the  
3 County's SEPA requirements; the County's requirements to protect agricultural lands and  
4 uses (see e.g. SCC 32.14.070); and with the County Comprehensive Plan and Agricultural  
5 Preservation Plan.  
6

7           7.3     The Examiner incorrectly concluded that the DNS, FEIS, and  
8 Addendum were based upon information and analyses sufficient to evaluate the proposal's  
9 probable significant aesthetic, scenic, and visual impacts; lighting impacts; agricultural  
10 impacts; wildlife and wildlife habitat impacts; RFI impacts; impacts upon the built and  
11 natural environment and surrounding land uses; and cumulative and indirect impacts.  
12

13           7.4     The Examiner and Council incorrectly concluded that the CUP  
14 approval was based upon information sufficient to support a determination that the proposal  
15 was in compliance with the County's CUP review criteria.  
16

17           7.5     The Examiner incorrectly concluded that there would be no probable,  
18 significant adverse agricultural, wildlife and wildlife habitat, RFI impacts and impacts upon  
19 the built and natural environment and surrounding land uses, and cumulative and indirect  
20 impacts. The Examiner also incorrectly concluded that the FEIS and Addendum adequately  
21 disclosed all significant aesthetic, scenic, and visual impacts.  
22

23           7.6     The Examiner erred by too narrowly applying SEPA's requirements  
24 regarding the proposal's agricultural, cumulative, and direct impacts and alternatives analysis  
25 and by too narrowly interpreting SEPA's "significance" standard.  
26  
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1           7.7    The Hearing Examiner and the Council erroneously approved the CUP  
2 despite that it was based upon a DNS, EIS, and Addendum that were erroneously issued and  
3 were incomplete and inadequate pursuant to the requirements of SEPA.  
4

5           7.8    The Examiner and the Council erred by approving the CUP because  
6 the proposed antennas will not be compatible with the surrounding area as required by SCC  
7 18.72.060(5).  
8

9           7.9    The Council and the Examiner erred by approving the CUP with  
10 conditions prepared by County staff that are too vague to accomplish adequate monitoring  
11 and enforcement if the project is developed and do not mitigate the proposal's significant  
12 impacts and incompatibility with the surrounding area.  
13

14           7.10   The Examiner and the Council erred in concluding that the proposal  
15 had been adequately mitigated and/or conditioned.  
16

17           7.11   The Council's decisions were based upon a number of legal and  
18 procedural errors, and were *ultra vires* actions in a number of ways, including but not  
19 limited to, in ordering the Examiner to issue the CUP before adequate SEPA review had  
20 been completed for the proposal; in usurping the Examiner's fact-finding and legal authority  
21 and inappropriately re-weighting evidence; in creating new legislative standards in a quasi-  
22 judicial proceeding in order to grant the CUP to S-R Broadcasting; and inappropriately  
23 relieving S-R Broadcasting from its burden of proof to demonstrate compliance with all of  
24 the County's requirements for approval of the proposed antennas.  
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1                   7.12 The Council's and the Examiner's decisions and hearings violated  
2 CPUSRV's and its members' constitutional and due process rights to a meaningful and fair  
3 hearing.  
4

5                   7.13 The Examiner's and Council's decisions fail to comport with state law  
6 and the SCC because they failed to include adequate findings of fact and conclusions of law.  
7 For example, many of the Examiner's and Council's findings and conclusions were  
8 confusing, vague, and only state the positions of parties, summarize the evidence presented,  
9 or amount to general conclusions drawn from an indefinite, uncertain, indeterminate  
10 narration of general conditions and events. The Council's and Examiner's decisions also  
11 were internally inconsistent -- often the conclusions and decision were not consistent with  
12 adopted findings or the evidence in the record. Thus, the findings and conclusions are  
13 inadequate under state law which requires that findings and conclusions identify and resolve  
14 disputed evidentiary issues and explicitly provide the bases of the Examiner's and Council's  
15 decision so that a reviewing court is fully informed regarding the bases for the decision  
16 made. In addition, the Examiner and Council ignored or dismissed without any analysis a  
17 number of issues raised by CPUSRV. Failing to address CPUSRV's issues is inconsistent  
18 with the above standards and CPUSRV's constitutional and due process rights to a  
19 meaningful and fair hearing. The Examiner and Council also erroneously adopted findings  
20 and conclusions beyond their respective authorities or jurisdictions.  
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1           8.     A Concise Statement of Facts Upon Which the Petitioner Relies to Sustain the  
2                    Statement of Error

3                   8.1     S-R Broadcasting proposes to construct four AM radio antennas in the  
4     USRV. Through the construction of four AM signal transmission antennas, S-R  
5     Broadcasting seeks to build a radio broadcast facility that would increase its existing radio  
6     station's 5,000 watt signal to 50,000 watts.  
7

8                   8.2     One proposed antenna will be 349 feet tall and the other three will be  
9     199 feet tall. One equipment building also is proposed on site. The 349 foot antenna tower  
10    is to be painted with orange and white stripes with lights. The three other antennas are to  
11    be painted gray. Grounding wire would be buried in a radial pattern at a relatively shallow  
12    depth with a radius of approximately 200 feet from the base of each tower (350 feet from the  
13    largest tower).  
14

15                  8.3     The site proposed for the antennas is currently undeveloped and is used  
16    as farmland.  
17

18                  8.4     The USRV is used for numerous recreational activities including  
19    fishing in the Snohomish River; walking, hiking, and wildlife watching in the Bob Heirman  
20    Wildlife Park; enjoyment of pumpkin patches and other U-cut or U-pick type farms; and  
21    recreational skydiving and ballooning. There are no facilities comparable to the proposed  
22    antenna facility anywhere in the USRV. No major light sources exist in the area and the  
23    night sky is unobstructed by permanent lights.  
24

25                  8.5     The USRV has a long and significant history of farming. S-R  
26    Broadcasting's site is zoned Ag-10. Under the County's comprehensive plan, the site is  
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**Bricklin Newman Dold, LLP**  
Attorneys-at-Law  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
Tel. (206) 264-8600  
Fax (206) 264-9300

1 designated "Riverway Commercial Farmland." Under the County's Agricultural  
2 Preservation Plan, the site is within an agricultural area deemed of "primary importance,"  
3 the most important type of agricultural land in the County.  
4

5 8.6 Properties in the valley surrounding the proposed site are used for a  
6 variety of agricultural enterprises, such as Craven Farm, a destination farm. Enterprises like  
7 the Craven Farm pumpkin patches are successful because of the rural experience they  
8 provide to the public. Indeed, these farms' financial success depends upon the USRV's  
9 bucolic setting. The Hearing Examiner found that the USRV's rural character -- unimpaired  
10 by looming antennas -- is vital to providing visitors with a rural farm experience:  
11

12 Mostly agricultural fields, [the Upper Snohomish River  
13 Valley] contains several farm building complexes typical of  
14 dairy farms and crop production, with enclosed barns, hay  
15 barns, milking parlors, equipment sheds and outbuildings as  
16 well as associated residential dwellings. One such farm,  
17 Craven Farm, . . . is heavily converted to direct marketing  
18 efforts, a trend in agriculture also known colloquially as agro-  
19 tourism and destination agriculture, wherein agricultural  
20 operators seek to draw retail clientele for farm products by  
21 creating an entertaining attraction, ranging from expanded  
22 farmstand stores to accommodating special occasion  
23 celebrations such as weddings/receptions, company and  
24 organizational retreats, which are attracted to the pastoral and  
25 scenic setting. It specifically operates a wedding facility, a  
26 separate use classification permitted outright in the A-10 zone  
27 applied to the area. Deb's U-Cut is more modestly set up to  
28 direct market its trees. The other farms in the upper  
Snohomish River Valley and northward in the main valley are  
more traditional product-oriented operations.

**Bricklin Newman Dold, LLP**  
Attorneys-at-Law  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
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1 See Ex. J (page 4, Finding 3). The proposed antennas will forever and permanently harm  
2 the ability of destination farms and other agricultural uses in the USRV to survive and thrive,  
3 and will cause both present and future loss of farming in the USRV.  
4

5 8.7 The Bob Heirman Wildlife Park (343 acres) and the Lord Hill  
6 Regional Park (1,600 acres) are in close proximity to the site. The BHWP provides the only  
7 secure roosting location for Trumpeter swans in the Snohomish River Valley. The proposed  
8 antennas will interfere with the use of this area as a migration route for approximately  
9 10,000 to 15,000 ducks that use the BHWP. The placement of the facility is not compatible  
10 with the use of the BHWP for winter roosting by trumpeter swans, and will create a flight  
11 hazard by increasing the opportunity and likelihood that airborne water fowl will hit and be  
12 killed or injured by the antenna structures.  
13

14 8.8 In 2002, the Snohomish County Parks Department described the  
15 proposed antennas' impacts on the BHWP:  
16

17 Equally important as the wildlife conservation themes of  
18 Heirman Wildlife Park are the high quality scenic viewing  
19 opportunities from a multitude of locations within the site.  
20 One of the most notable territorial view corridors is precisely  
21 in the direction of the antennas site. (Photo exhibits  
22 provided.) Unless the proposed structures are greatly reduced  
23 in height, there won't be much that could hide them. This is  
24 a real concern that the very presence of the antennas will  
25 greatly reduce the visual appeal, and thus popularity, of our  
26 Wildlife Park. A great deal of public funding has been  
27 invested to secure and maintain this special park property.  
28

8.9 The proposed site is located within a shoreline of statewide  
significance, Snohomish River. The River in and around the BHWP is famous for fisherman

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1 and is heavily fished for salmon, steelhead, and trout. It is known by many as the best  
2 fishing spot in Snohomish County.

3  
4 8.10 The City of Snohomish is north of the project site. To the west is the  
5 Kenwanda/Fiddler's Bluff neighborhood. To the east is the Lord Hill neighborhood. To the  
6 south is the Kenwanda/Fiddler's Bluff and Clearview neighborhoods. In all of the  
7 neighborhoods, many of the dwellings are oriented to take advantage of scenic views of the  
8 upper Snohomish River Valley floor and the Cascades or Olympic Mountains beyond.

9  
10 8.11 A large body of evidence demonstrates that the antennas, without  
11 question, will be a blight on the scenic and aesthetic resources of the Valley. The unmarred  
12 rural vistas of the Valley will be gone. The large antennas will be seen for miles around,  
13 looming over the farms, parks, and other rural properties. Local farms will not be able to  
14 convey the same rural experience to the public, because the rural landscape will be marred  
15 with the large antennas. The nightscape will be forever diminished. Dark rural skies will  
16 be altered by antenna lights. Views in the Kenwanda neighborhood will be significantly  
17 impacted. The antennas will also create a foothold in the USRV for other new incompatible  
18 uses, because other new incompatible uses will use the antennas to claim the beauty and rural  
19 setting have already been degraded and diminished. This will further the negative impact  
20 the proposed antennas will have on the USRV.  
21  
22

23 8.12 The FEIS concluded that there would be significant adverse impacts  
24 to at least twenty-one (21) views from the Kenwanda neighborhood that cannot be mitigated.  
25  
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1 The Addendum concluded that two additional views on the USRV floor would be  
2 significantly impacted and cannot be mitigated.

3  
4 8.13 The influence of technology on small businesses has not left the  
5 residents of the USRV behind. From their homes, local residents are able to conduct  
6 business in endeavors such as multi-media software development, consulting, and structural  
7 engineering.

8  
9 8.14 The facility will cause a significant disruption of electronic devices  
10 important to the surrounding farms, small businesses, and households. The intense radio  
11 waves in the immediate vicinity will disrupt computerized milking equipment, telephones,  
12 computers (including modems), hearing aids, answering machines, fax machines, security  
13 alarm systems, handicap person emergency call-out systems, garage door openers, public  
14 address systems, televisions, VCRs, and other equipment. No land use permitted outright  
15 in the USRV can compare to this level of impact on innocent neighbors.

16  
17 8.15 The property values of homes overlooking the USRV will be  
18 demonstrably diminished due to the proposed antennas. For example, one home in the  
19 Kenwanda neighborhood had an appraisal done of their home based upon construction of the  
20 proposed antennas. The appraiser concluded the property would be devalued by the  
21 antennas. There is no question that the value of homes even closer to the proposed antenna  
22 on the USRV floor undoubtedly will be negatively impacted.

23  
24 8.16 The Council's June 7, 2006 decision and Examiner's March 16, 2006  
25 decision are a culmination of a series of decisions and actions that began in 2002. In 2002,  
26  
27

1 a previous Deputy Hearing Examiner, Peter Donahue, issued two decisions. Exs. C, D  
2 hereto. One, he reversed a Determination of Non-Significance issued to S-R Broadcasting  
3 by Planning and Development Services (“PDS”) and required S-R Broadcasting to prepare  
4 an EIS evaluating the significant aesthetic view impacts to be caused by the proposal. Two,  
5 the Examiner denied S-R Broadcasting’s request for a CUP on two bases. First, he  
6 determined that the CUP was based upon inadequate environmental review pursuant to  
7 SEPA. Second, he ruled that the CUP did not meet the County’s criteria for the granting  
8 of a CUP codified in the SCC. S-R Broadcasting appealed the Examiner’s decision denying  
9 the CUP to the County Council. S-R Broadcasting did not appeal the Examiner’s decision  
10 reversing the DNS and requiring an EIS.  
11  
12

13 8.17 The Examiner upheld the DNS as it related to wildlife, wildlife habitat,  
14 RFI, and agricultural impacts. This was erroneous given the significant wildlife habitat,  
15 RFI, and agricultural impacts demonstrated by CPUSRV at the hearings. In addition, the  
16 Examiner erroneously appeared to base his decisions regarding agricultural and RFI impacts  
17 upon conditions to protect agricultural uses and to prevent RFI impacts that did not exist or  
18 had not been adopted or required by the County.  
19  
20

21 8.18 On September 18, 2002, pursuant to a motion by S-R Broadcasting,  
22 the Examiner who issued the July 31, 2002 decisions, Peter Donahue, recused himself. S-R  
23 Broadcasting claimed that the Examiner had conducted too many site visits.  
24

25 8.19 On November 14, 2002, an Examiner *Pro Tem*, Wick Dufford, denied  
26 all of the petitions for reconsideration the parties had filed of the July 2002 decisions by Mr.  
27  
28

1 Donahue. Examiner Dufford determined that Examiner Donahue had not committed any  
2 error in conducting his site visits. See Ex. G.

3  
4 8.20 On February 26, 2003, the Council reversed the Hearing Examiner's  
5 denial of the CUP and instead ordered the Examiner to grant the CUP:

6 The council hereby grants the appeal, in part, and the July 31,  
7 2002 decision of the Deputy Hearing Examiner is reversed and  
8 the matter is remanded to the Examiner with instruction to  
9 grant the Conditional Use Permit, subject to the conditions  
10 stated in the PDS Staff Recommendation (Ex. 919), as may be  
11 modified by PDS staff to reflect changes in the proposal made  
12 by the Applicant, and subject to SEPA. Should PDS conclude  
13 revisions are needed, the Examiner shall receive and  
14 incorporate revised conditions into his decision. Should the  
15 Examiner determine it is necessary, the hearing may be  
16 reopened for the limited purpose of considering comment on  
17 the revised conditions from representatives of the  
18 Appellant/Applicant and CPUSRV before accepting the PDS  
19 recommendations.

20 See Ex. B.

21 8.21 By its own terms, Motion 03-130 ordered the Examiner "to grant the  
22 conditional use permit." In addition, in ordering the Examiner to grant the CUP, the  
23 Council gave very limited discretion to the Examiner -- he could only consider changes in  
24 conditions for the CUP as proposed by PDS. Indeed, the Council told the Examiner who  
25 could only conduct a subsequent hearing on the CUP "for a limited purpose of considering  
26 comments on the revised conditions."

27 8.22 On February 23, 2003, the date Motion 03-130 was decided, the Draft  
28 EIS required by the Examiner (when he partially reversed the DNS in July 2002) had not  
been prepared or issued by the County. The Draft EIS for the proposed antennas was not

**Bricklin Newman Dold, LLP**  
Attorneys-at-Law  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
Tel. (206) 264-8600  
Fax (206) 264-9300

1 completed and issued until December 2003. The FEIS was completed and issued in January  
2 2005 with an Addendum issued in February 2006. Thus, Motion 03-130's direct order to  
3 the Examiner to grant the CUP was not based upon complete, adequate SEPA review  
4 because SEPA review for the proposed antennas was not completed until February 2006.  
5

6 8.23 In Motion 03-130, the Council, also for the first time, created new  
7 requirements to deny a CUP. For example, the Council stated that aesthetic consideration  
8 could not alone be the basis to deny the CUP, but that aesthetic considerations had to be  
9 coupled with a "demonstrable effect on property values and/or a significant potential to alter  
10 surrounding uses." The Council also created new standards by claiming consideration of  
11 "public need" and "unique siting conditions" were also criteria that could be used to grant  
12 a CUP. Regarding these new requirements, the Council stated that "the Examiner's office  
13 is directed to make future decisions consistent with the analysis set forth in this decision."  
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16 8.24 The new standards were not made aware to the Examiner, CPUSRV,  
17 or any party before the Council's Motion 03-130 was issued on February 23, 2003. Because  
18 the Council created wholly new standards to render a decision on the CUP, it harmed both  
19 CPUSRV and other members of the public who used the existing, adopted CUP standards  
20 to participate in the case and the Examiner who used them to review and deny the CUP in  
21 2002. Because these new standards were not lawfully adopted legislatively, was not made  
22 known to the Examiner or the public before issuance of the February 23, 2003 decision,  
23 Motion 03-130 was invalid and *ultra vires*.  
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1           8.25 The Council's illegal decision to add requirements to the CUP  
2 approval criteria in a final decision at the end of a quasi-judicial proceeding also violated  
3 CPUSRV's and its members' due process rights, violated the equal protection provision of  
4 the Constitution, and amounted to illegal "special legislation" benefitting S-R Broadcasting.  
5

6           8.26 In adopting Motion 03-130, the Council overstepped its appellate role  
7 and substituted improperly its judgment with the Examiner on factual and legal issues. The  
8 Council erroneously mischaracterized the Examiner's July 31, 2002 decision on review;  
9 inappropriately and illegally attempted to influence future review of any required shoreline  
10 permits for S-R Broadcasting; erroneously relieved S-R Broadcasting of its burden of proof  
11 and re-weighed evidence before the Examiner; erroneously reversed the Examiner's  
12 determination regarding SCC 32.50.100; and erroneously mischaracterized and re-wrote its  
13 CUP criteria and its own zoning code, including by attempting to elevate the proposal to a  
14 "permitted," not a conditional use.  
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17           8.27 In Motion 03-130, the Council also erred in overruling the Examiner's  
18 determination that the proposed antennas should be viewed on their own merits as to whether  
19 or not they comply with the County's CUP criteria, not whether S-R Broadcasting has  
20 voluntarily redesigned its proposal in the past to attempt to come into compliance with  
21 County requirements or to minimize impacts.  
22

23           8.28 The FEIS was issued in January 2005. The FEIS determined, in part,  
24 that there would be significant visual impacts to neighbors in the Kenwanda neighborhood  
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1 from the proposed antennas. The FEIS also concluded that these significant impacts could  
2 not be mitigated by S-R Broadcasting.

3  
4 8.29 CPUSRV appealed the FEIS to the Examiner because it failed to  
5 adequately identify or evaluate all of the significant impacts to be caused by the proposed  
6 antennas. A new Examiner, Ed Good, took over the case at this stage. On October 4, 2005,  
7 the Examiner partially agreed with CPUSRV and remanded the FEIS to PDS for further  
8 review. See Ex. H.

9  
10 8.30 Although the Examiner partially upheld CPUSRV's appeal of the  
11 adequacy of the FEIS, the Examiner erred in failing to consider and address the following:

- 12 • The FEIS, which only identified some, but not all, significant impacts to be  
13 caused by the proposal, is inadequate under SEPA.
- 14 • The FEIS erroneously omitted a number of views that the Examiner already  
15 determined would be significantly impacted and needed to be evaluated in an  
16 EIS. These views included views from the Snohomish River; views from the  
17 Snohomish River riverbanks; not all impacted views in the BHWP; not all  
18 impacted views from Craven's Farm and Deb's U-Cut; not all impacted views  
19 from residents on the USRV floor; and not all impacted views seen by  
20 recreational balloonists.
- 21 • The FEIS' methodology, assertedly based upon the FHWA's visual impact  
22 methodology, was flawed in a number of ways that led to a minimization of  
23 and failure to identify significant impacts to be caused by the proposal.  
24 Methodology errors included a failure in the FEIS to determine the viewshed  
25 area; a failure in the FEIS to determine impacted landscape units; a failure in  
26 the FEIS to determine viewer numbers and length of exposure; and a failure  
27 in the FEIS to identify and evaluate local character and local values.
- 28 • Regarding the FEIS' failure to adequately determine the viewshed area, errors  
included the FEIS' reliance upon the applicant's consultant to identify and  
prepare the viewpoints used in the FEIS; a failure to prepare a topographical  
viewshed map, instead relying upon the roads driven and paths walked by

**Bricklin Newman Dold, LLP**  
Attorneys-at-Law  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
Tel. (206) 264-8600  
Fax (206) 264-9300

1 consultants; and the County's admission that there was no viewshed map or  
2 analysis in the FEIS.

- 3 • The FEIS contained numerous errors in the evaluation of viewpoints and  
4 viewpoint simulations in Table A-5 which lead to a minimization of and  
5 failure to identify significant impacts to be caused by the proposal. These  
6 errors included the erroneous assignment of viewer sensitivity ratings; the  
7 admission that only one person evaluated viewpoints 20-27 in violation of  
8 accepted practice; the inappropriate involvement of the applicant's consultant  
9 in the County's environmental review; errors in averaging manmade and  
10 natural features in Table A-5 and averaging foreground, middle ground, and  
11 background views in Table A-5 which both resulted in the watering down of  
12 the values of existing views; and the admission that manmade elements in  
13 viewpoints to reduce the visual ratings for existing viewpoints.
- 14 • The FEIS erroneously used an additional, unique "screen" developed by the  
15 County for this proposal which further limited the finding of significant  
16 impacts in the FEIS. In the FEIS, an impact could only be determined to be  
17 significant if a viewpoint originally was given a "high" score which then  
18 dropped to a "low" score with introduction of the proposed antennas. There  
19 is no basis in the FHWA methodology for this screen and it is inconsistent  
20 with the standard of significance in SEPA which requires consideration of the  
21 amount of impact to be caused by a proposal. The screen resulted in failing  
22 to attribute significant impacts to a number of viewpoints.
- 23 • The FEIS' photosimulations for the viewpoints inappropriately minimized the  
24 determination of significant impacts to be caused by the proposal. The  
25 photosimulations were not based upon any methodology but were the result  
26 of a random collection of views chosen by the applicant's consultant in  
27 conjunction with the FEIS preparers. The FEIS' photosimulations  
28 erroneously were based upon only one view at a property that was then used  
to determine no significant visual impacts. The FEIS' photosimulations were  
inappropriately cropped or staged with trees, poles, and/or structures to  
minimize the introduction of antennas. The FEIS' photosimulations were  
erroneously doctored to be so hazy and washed out that a reasonable rendition  
of the proposed antennas is not shown.
- The FEIS failed to evaluate impacts of the proposed antennas at dusk, at  
dawn, and at night.
- The FEIS failed to adequately identify all indirect and cumulative impacts to  
be caused by the proposal.

Bricklin Newman Dold, LLP  
Attorneys-at-Law  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
Tel. (206) 264-8600  
Fax (206) 264-9300



1 Broadcasting requested the Examiner to grant the CUP because the Council had told the  
2 Examiner to do so in Motion 03-130: "S-R Broadcasting looks forward to the prompt  
3 issuance of the conditional use permit for the proposal, as required by the Council's  
4 2/23/2003 order."  
5

6 8.34 On March 16, 2006, the Examiner followed the Council's order in  
7 Motion 03-130 and issued the CUP. See Ex. J. The Examiner stated in his decision that he  
8 believed the Council already had granted the CUP in Motion 03-130 that he was simply  
9 following the orders of the Council to issue the CUP. The Examiner did not discuss in detail  
10 in his findings or conclusions any of the applicable CUP standards found in the SCC or the  
11 evidence before him in his decision to issue the CUP.  
12

13 8.35 The Examiner relied upon a four year old staff report to support CUP  
14 approval. This staff report is outdated. For example, the staff report is not based upon  
15 consideration of the FEIS or Addendum created for this proposal which found that there  
16 were significant impacts to be caused by the proposal that could not be mitigated. The staff  
17 report relies upon photosimulations that the Examiner rejected in his July 2002 decision.  
18 The staff report claims that a purported conflict between the County Shoreline Master  
19 Program and the SCC meant that the proposed antennas should be given "substantial  
20 latitude" as to where they may be located. This conclusion was expressly rejected by the  
21 Examiner in the July 2002 decision. The Examiner erred in 2006 in relying on the four year  
22 old staff report without addressing its outdated and flawed contents.  
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1           8.36 The Examiner claimed that the conditions of requiring some plantings  
2 at the foot of the antennas, while not mitigating the significant impacts of the proposed  
3 antennas, could help. No evidence in the record supported the Examiner's belief about these  
4 conditions.  
5

6           8.37 CPUSRV appealed the CUP approval in the Examiner's March 16,  
7 2006 decision to the Snohomish County Council. Despite the clear statements by the  
8 Examiner and S-R Broadcasting to the contrary, Council members claimed at the May 15,  
9 2006 hearing that the Council had not ordered the Examiner to issue the CUP in Motion 03-  
10 130 calling it a "preliminary decision." The Council upheld the Examiner's decision and  
11 approved the CUP on June 7, 2006. See Ex. A.  
12

13           8.38 In the Council's June 7, decision, the Council committed a number of  
14 legal and factual errors, including but not limited to, overstating its review authority in a  
15 manner inconsistent with state law; mischaracterizing Motion 03-130 as a "preliminary"  
16 decision which did not limit the Examiner's authority or direct him to issue the CUP;  
17 claiming without basis that the Examiner independently made his decisions regarding the  
18 proposed antennas; mischaracterizing its creation of new CUP standards in Motion 03-130;  
19 giving special status to the proposed antennas by claiming they are "utilities;" and entering  
20 factual findings not supported by evidence in the record. The Council's characterizations  
21 of Motion 03-130 are not supported by its own discussions of the motion in its June 7, 2006  
22 decision, by the language of Motion 03-130, the evidence in the record, or County policies  
23 and requirements.  
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1           8.39 The Council's factual findings regarding the proposed antennas  
2 "compatibility" with the USRV were not supported by any evidence in the record. For  
3 example, the finding that the proposed antennas will be compatible with surrounding  
4 destination agricultural uses is supported by no evidence in the record. The Council's  
5 finding that the surrounding landscape is not untouched and citing "high-tension power lines,  
6 parking lots, picnic tables, residential development, driveways, automobiles, mailboxes,  
7 garbage cans, "for sale" signs, lampposts, roadways, telephone poles and wires, fireplugs"  
8 to demonstrate compatibility is not supported by the record because none of these items are  
9 comparable to a 349-foot striped and lighted antenna and three 199-foot grey antennas. In  
10 addition, the Council was not entitled to re-weigh the evidence before the Examiner as it did  
11 to make this finding. The Council also erred by claiming that claimed "unique siting"  
12 conditions or claimed "public need" made the antennas compatible. These claims, in  
13 addition to being legally flawed and without factual basis, simply have nothing to do with  
14 compatibility.  
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18           8.40 The Council erred in its June 7, 2006 decision in acknowledging the  
19 significant visual impacts to be caused by the proposed antennas (as documented in the FEIS  
20 and Addendum), at the same time claiming "the Council re-affirms its belief that the  
21 proposal meets the applicable CUP criteria, and has been conditioned appropriately."  
22 Because there is no credible evidence that the proposed antennas will be compatible or that  
23 any conditions will contribute to the proposal's "parity" and "compatibility" or will "soften"  
24 impacts in the USRV, the Council's conclusion is factually and legally erroneous.  
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1           8.41 The Council's June 7, 2006 decision was mailed to the parties of  
2 record on June 9, 2006.

3           9.     Request for Relief

4           Based on the above, CPUSRV requests the following relief:

5           9.1     An order requiring Snohomish County to submit to the Court a  
6 certified copy of the relevant, non-duplicative portions of the administrative record for  
7 judicial review;

8           9.2     An order scheduling a site visit in the USRV with the Court and the  
9 parties;

10          9.3     An order reversing the Determination of Non-Significance, the  
11 Environmental Impact Statement (in part), and Addendum (in part) as inadequate and  
12 inconsistent with SEPA's requirements;

13          9.4     An order voiding or reversing the CUP approval for the proposed  
14 antennas on the basis that it was based upon improper and incomplete SEPA process and  
15 analysis;

16          9.5     An order voiding or reversing the CUP approval for the proposed  
17 antennas based upon the various factual and legal errors described herein;

18          9.6     An award of attorneys' fees and costs;

19          9.7     Any other relief deemed necessary or just by the Court.  
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Dated this \_\_\_\_\_ day of June, 2006.

Respectfully submitted,

BRICKLIN NEWMAN DOLD, LLP

By:

\_\_\_\_\_  
Jennifer A. Dold  
WSBA No. 23822  
Attorneys for CPUSRV

CPUSRV\Superior\Land Use Petition