

**BEFORE the HEARING EXAMINER for the  
CITY of SULTAN**

**DECISION**

FILE NUMBERS: CUP21-001 & VR21-001

APPLICANT: Vertical Bridge  
C/o Technology Associates EC, Inc.  
9725 3<sup>rd</sup> Avenue NE, Suite 410,  
Seattle, WA 98115

TYPE OF CASE: Consolidated: 1) Conditional Use Permit to construct a lattice tower for cellular service provider co-location; and 2) Variances from Sultan Municipal Code provisions associated with the proposed tower

STAFF RECOMMENDATION: Approve both applications subject to conditions

EXAMINER DECISION: GRANT both applications subject to conditions

DATE OF DECISION: September 21, 2021

**INTRODUCTION <sup>1</sup>**

Vertical Bridge <sup>2</sup> seeks Conditional Use Permit (“CUP”) approval to construct a 240-foot tall lattice communications tower (Vertical Bridge tower site #US-WA-5129) and Variances from several sections of the Sultan Municipal Code related to the proposed tower. (The specific Variances are specified in Finding of Fact, 2, below.) Vertical Bridge filed CUP and Variance Applications on April 6, 2021. (Exhibits 1, PDF 2; 2; 3 <sup>3</sup>) The Sultan Department of Community Development (“DCD”) deemed the applications complete on April 27, 2021. DCD issued a Notice of Application on May 24, 2021. (Exhibit 16)

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<sup>1</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

<sup>2</sup> Vertical Bridge is the United States’ largest privately owned provider of telecommunications towers. Vertical Bridge owns over 3,000 tower sites and operates some 300,000 tower sites throughout North America. Vertical Bridge is not a cellular service provider; it only owns/operates the towers upon which the cellular vendors’ antennas are mounted. (Testimony)

<sup>3</sup> 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 Recommendation is based upon all documents in the record.

The subject property is located at 31020 124<sup>th</sup> Street SE, about 3,000 feet west of Sultan Basin Road. Its Assessor's Parcel Numbers are 28082900200500 ("Parcel 005") and 28082900201000 ("Parcel 010"). (Exhibit 2, PDF 10)

The Sultan Hearing Examiner ("Examiner") viewed the subject property via Google Earth on September 15, 2021. The Examiner is generally familiar with this part of Sultan, having presided over several land use hearings involving property just to the east of Parcels 005 and 010.

The Examiner held an open record hearing on September 15, 2021. The hearing was conducted in a hybrid fashion with some participants at City Hall and others, including the Examiner, participating remotely using the "Zoom" platform due to assembly restrictions attendant to the current COVID-19 pandemic. DCD gave notice of the hearing as required by the Sultan Municipal Code ("SMC"). (Exhibit 17) No testimony or evidence was entered into the record by the general public either in support of or in opposition to the application.

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

Exhibits 1 - 19: As enumerated in the Staff Report to Hearing Examiner, § E, PDF 3 & 4  
Exhibit 20: Vertical Bridge's PowerPoint hearing presentation

The action taken herein and the requirements, limitations and/or conditions recommended for imposition by this recommendation 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. Vertical Bridge proposes to erect a 240-foot tall, lattice communications tower in the center of the approximate 40-acre, City-owned tract composed of Parcels 005 (9.03 acres) and 010 (30.63 acres). Vertical Bridge refers to this facility as its US-WA-5129 site. Vertical Bridge has leased a 75-foot by 75-foot area in the middle of that 40-acre tract within which the tower and equipment cabinets for the cellular vendors who will place antennas on the tower will be located. The tower will be made of galvanized steel; Vertical Bridge does not propose to paint it. Vertical Bridge proposes to enclose the 75-foot by 75-foot area with a barbed wire-topped, 6-foot chain link fence. The legal description on the applications covers the entirety of Parcels 005 and 010; Vertical Bridge's current lease with the City is for only the 75-foot by 75-foot square in the middle of the tract. An access road will traverse the parcels from the southeast corner to the fenced area in the center. The initial tenant on the tower will be T-Mobile. The tower will be able to accommodate at least two additional cellular telephone vendors. (Exhibits 5; 6; 9; 10; 14)
2. Vertical Bridge's proposal requires a CUP and three Variances:

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- A. CUP. Parcels 005 and 010 are zoned Public Buildings/Parks/Open Space (“PB/P/OS”). (Exhibit 1) Large-scale communications towers <sup>4</sup> are a listed Conditional Use in the PB/P/OS zone. [SMC 16.12.080(C)(1)] Therefore a CUP is required. <sup>5</sup>
  - B. Height Variance. Subsections 16.66.070(C)(2) and 16.66.080(D) SMC limit maximum lattice tower height to 150 feet. The proposed 240-foot tall tower thus requires a height variance.
  - C. Color Variance. Subsection 16.66.090(B)(4) SMC requires that “[t]owers shall have a color generally matching the surroundings or background that minimizes their visibility”. DCD has required a Variance for color. (Exhibit 1)
  - D. Fence/Landscape Variance. Subsection 16.66.080(H) SMC requires that lattice towers must be landscaped; subsection 16.66.090(B)(10) provides that “chain link ... fencing is prohibited unless it is fully screened from public view by a minimum eight-foot-wide approved landscaping strip.” Vertical Bridge does not propose to create a landscape strip around the enclosure fence. Therefore, a Variance is required from both code provisions.
3. The review criteria for CUPs are set forth at SMC 16.24.050(A). The preamble to the criteria reads as follows:

Before any conditional use permit may be granted, the applicant shall show that:

The five specific criteria which follow that preamble and the facts relating to each are:

- A. “1. The proposed conditional use will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity of the proposed conditional use or in the zoning district in which the subject property is situated;”

Facts: The tower will be located in the middle of the 40-acre tract composed of Parcels 005 and 010. The area where the tower will be has been previously cleared; two City water tanks, one about 50 feet tall, are located to the east of the tower site on Parcel 005. A Bonneville

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<sup>4</sup> A term that is not defined in the SMC.

<sup>5</sup> Subsection 16.66.070(A) SMC states that monopole II towers (those taller than 60 feet) are allowed only in the Highway Oriented Commercial (“HOC”) and Manufacturing (“M”) zones; subsection 16.66.080(A) SMC states that lattice towers are allowed only in the M zone. The term “tower” is defined in the SMC to include both monopoles and lattice towers. [SMC 16.66.020(Z)] Those restrictions are “use” restrictions; variances are not allowed to change use restrictions. However, those restrictions in Chapter 16.66 SMC directly contradict the provision in Chapter 16.12 SMC which expressly allows large-scale communication towers in the PB/P/OS zone. The Examiner concludes that the express allowance of large-scale communication towers in the PB/P/OS zone takes precedence over the implied prohibition in Chapter 16.66 SMC. Placement of the tower in the PB/P/OS zone does not need a Variance, contrary to DCD’s position in its Staff Report. (Exhibit 1) A Variance couldn’t be granted anyway as such would be a use variance.

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Power Administration (“BPA”) easement, about 150+ feet wide runs more or less east to west about 100 feet south of the tower site. The BPA easement contains two high voltage transmission lines on large, galvanized steel towers. The remainder of the 40-acre tract is forested City property. There are no homes in close proximity. Downtown Sultan is located about 1.27 miles due south of the tower site at an elevation about 250 feet lower. (Exhibits 5; 6; 9; 10; 11; 20, PDF 4 & 5; and testimony)

- B. “2. The proposed conditional use shall meet or exceed the performance standards that are required in the zoning district that it will occupy;”

Facts: The tower will meet all criteria except those for which Variances have been legally applied. (Exhibits 1; 6)

- C. “3. The proposed conditional use shall be compatible generally with the surrounding land uses in terms of traffic and pedestrian circulation, building and site design as approved by the planning director;”

Facts: The facility will be un-staffed. The only visitors will be the occasional maintenance or repair persons. It will not generate measurable traffic; it will generate no pedestrian traffic nor interrupt any pedestrian traffic. (Exhibits 1; 6)

- D. “4. The proposed conditional use shall be consistent with the goals and policies of the comprehensive land use policy plan;”

Facts: DCD and Vertical Bridge have analyzed several applicable or arguably applicable comprehensive plan policies. Both found the proposal to be consistent with the analyzed policies. (Exhibits 1; 6)

- E. “5. All measures have been taken to mitigate the possible adverse impacts which the proposed use may have in the zoning district in which the subject property is located.”

Facts: The record does not identify any adverse impacts requiring mitigation. A SEPA threshold Determination of Nonsignificance was issued on May 24, 2021. (Exhibit 16) It was not appealed. (Exhibit 1, PDF 9)

4. Vertical Bridge is somewhat ambivalent as to whether the CUP should apply to the entire 40-acre tract (Parcels 005 and 010) or just to the leased 75-foot by 75-foot portion in the center. (Testimony)

5. The review criteria for a Variance are set out at SMC 2.26.190. The preamble to the criteria reads as follows:

No application for a variance shall be granted unless the examiner finds:

The four specific criteria which follow that preamble and the facts relating to each are:

- A. “A. The variance shall not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and zone in which the property on behalf of which their application was filed is located; and”

Facts: Criterion A is very similar to Bellevue’s Criterion A (as it existed in the 1990s). Bellevue’s Criterion A was the subject of adjudication by the Washington State Court of Appeals. [*Hoberg v. City of Bellevue*, 76 Wn. App. 357, 884 P.2d 1339 (1994)] Decisions of the Court of Appeals establish legal precedent, especially where the ordinance language presently at issue is virtually identical in all substantive respects with the ordinance language ruled on by the Court. The *Hoberg* court ruled as follows regarding Bellevue’s version of Criterion A:

Criterion A restricts the granting of use variances. ... Relief from setback is a classic example of an area variance, as opposed to a use variance. An area variance is one which does not change the specific land use but provides relief from dimensional requirements such as setback, yard size, lot coverage, frontage or height restrictions.

...

In short, Hoberg’s application did not propose a use variance. The Board [of Adjustment] erred in denying Hoberg’s application as contrary to Criterion A.

[*Hoberg*, at 360 and 361] Sultan’s Criterion A must be interpreted in a similar fashion.

Vertical Bridge’s proposal does not involve a use variance.

- B. “B. That the granting of such 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 subject property is situated; and”

Facts: The tower will be located in the middle of the 40-acre tract composed of Parcels 005 and 010. The area where the tower will be has been previously cleared; two City water tanks, one about 50 feet tall, are located to the east of the tower site on Parcel 005. A Bonneville Power Administration (“BPA”) easement, about 150+ feet wide runs more or less east to west about 100 feet south of the tower site. The BPA easement contains two high voltage transmission lines on large, galvanized steel towers. The remainder of the 40-acre tract is forested City property. There are no homes in close proximity. Downtown Sultan is located about 1.27 miles due south of the tower site at an elevation about 250 feet lower. (Exhibits 5; 7; 9; 10; 11; 20, PDF 4 & 5; and testimony)

- C. “C. That such variance is necessary: 1. Because of special circumstances set forth in the findings relating to size, shape, topography, location or surroundings of the subject property, to provide it with use rights and privileges permitted to other properties in the vicinity and in the zone in which the subject property is located; and”

Facts: Height Variance. The additional height is needed in order to provide desirable cellular telephone coverage to Sultan. The proposed tower height will greatly improve coverage in both the Sultan Basin Road area and in the downtown area. The tremendous elevation difference between the downtown, valley floor part of Sultan and the Sultan Basin Road part of Sultan requires either a high tower or many shorter towers to provide acceptable coverage. The proposed tower will be unobtrusive or hardly visible from almost all vantage points. (Exhibits 7; 11; 12; 20)

Color Variance. Four large, galvanized BPA towers exist within close proximity to the proposed tower. The proposed galvanized communications tower will blend in with the BPA towers. When the sky is overcast (a frequent occurrence in this region), the galvanized finish will become almost invisible against the sky. There will be few, if any, locations off-site where one will be able to see the base of the tower against its forest background. (Exhibits 7; 9; 11; 20, PDF 4)

Fence/Landscape Variance. The area around the base of the tower will essentially be not visible from off-site locations due to the forest nature of the majority of the City’s 40-acre tract. (Exhibits 7; 9; 11)

- D. “C. That such variance is necessary: ... 2. Because for reasons set forth in the findings, the variance as approved would contribute significantly to the improvement of environmental conditions, either existing or potentially arising from the proposed improvement.”

Facts: Height Variance. The higher tower will enhance cellular telephone reception throughout the City, thus providing enhanced personal security for City residents. The height of the tower will allow several carriers to share space on the tower, thus obviating a greater number of shorter towers more closely located to built-up areas. (Exhibits 7; 20)

Color Variance. This criterion doesn’t apply to this Variance.

Fence/Landscape Variance. This criterion doesn’t apply to this Variance.

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

## LEGAL FRAMEWORK <sup>6</sup>

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

### Authority

CUPs and Variances are Type III applications which are subject to an open record hearing before the Examiner. The Examiner makes a final decision on the applications which is subject to the right of reconsideration and appeal to Superior Court. [SMC 2.26.125 and 16.06.020(C), Tables 16.06-A & -B]

### Review Criteria

The review criteria for CUPs at SMC 16.24.050(A) have been listed in Finding 3, above. The review criteria for Variances at SMC 2.26.120(C) have been listed in Finding 5, above.

The Local Project Review Act [Chapter 36.70B RCW] establishes a mandatory “consistency” review for “project permits”, a term defined by the Act to include “building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan”. [RCW 36.70B.020(4)]

- (1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project’s consistency with applicable development regulations or, in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.
- (2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:
  - (a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;
  - (b) Density of residential development in urban growth areas; and
  - (c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by [the Growth Management Act].

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<sup>6</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

[RCW 36.70B.030]

### 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)]

In 2014 the State Supreme Court flatly declared: “While it originated at common law, the vested rights doctrine is now statutory.” [*Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014)] The *Potala* court rejected a contention that the filing of a complete shoreline substantial development permit application vested development rights because no statutory provision established vested rights for shoreline permits. [*Supra*, at 196-206]

CUPs are not the subject of any state vesting statute. If Sultan had a local vesting ordinance applicable to land use applications, the Examiner would be obliged to follow it as enacted. [*Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994); *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009)] But the City has no such local ordinance. Thus, the Examiner must follow the most current case law.

Under the most current case law, there is no vesting for CUP applications because there is no statutory provision providing vesting for such applications.

Appellate courts have never applied the vested rights doctrine to variance applications.

Vesting is not particularly important in this case as the City has made no development regulations changes between the time the application was filed and this date.

### Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof.

### 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. The evidence in the record, especially Exhibits 1, 5, 6, 9, 11, 12, and 20, demonstrate conclusively that Vertical Bridge’s proposal meets all criteria for issuance of a CUP.



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2. The evidence in the record, especially Exhibits 1, 5, 7, 9, 11, 12, and 20, demonstrate conclusively that Vertical Bridge's proposal meets all criteria for issuance of the requested height variance, color variance,<sup>7</sup> and fence/landscaping variance.
3. Virtual Bridge's lattice communications tower passes the "consistency" test: The use is allowed in the PB/P/OS zone upon issuance of a CUP, requested herein; density is not relevant as this is not a residential use; and adequate utilities are available. (Exhibit 19)
4. 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. The Examiner concludes that each Variance being approved should be expressly identified in the conditions by code section and that the amount of variance from standards should be specified. In addition, a condition should be added holding that no variances other than those expressly listed are either approved or implied. Appropriate conditions will be added.
  - B. The Examiner concludes that the CUP should apply to the entire 40-acre tract (Parcels 005 and 010) rather than just to the 75-foot by 75-foot leased area. The analyses herein have considered the entire property. If at some time in the future Vertical Bridge found it necessary to enlarge the fenced area, it would have to negotiate a change to its lease with the City. But if the CUP applies to the entire tract, it would not also have to return for additional CUP authority.
  - C. Recommended Conditions 2 and 3. The Examiner will replace the word "applicant" with "permittee." Someone might argue in the future that the word "applicant" applied only to the original permit applicant. Since land use entitlement permits "run with the land," Vertical Bridge may not always be the permit holder. In order to avoid any future misunderstandings, a word referring to the current permit holder, whomever that may be, will be substituted.
5. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

## DECISION

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<sup>7</sup> Frankly, the Examiner does not believe that the color variance is needed: In those areas where the tower will be most visible from off-site, it will be seen against a backdrop of sky. It could reasonably be argued that the unpainted, galvanized metal color will blend quite nicely into that backdrop. From that perspective, a color variance is not required. However, since a color variance has been sought, the Examiner elects to take a very conservative approach and retain that portion of the request rather than dismissing it.

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

- A. **GRANTS** a Conditional Use Permit to construct a 240-foot tall lattice communications tower; and
- B. **GRANTS** Variances from SMC 16.66.070(C)(2), 16.66.080(D), 16.66.080(H), 16.66.090(B)(4), and 16.66.090(B)(10) as specifically enumerated in the Conditions;

**BOTH SUBJECT TO THE ATTACHED CONDITIONS.**

Decision issued September 21, 2021.

*John E. Galt*

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John E. Galt,  
Hearing Examiner

**HEARING PARTICIPANTS <sup>8</sup>**

Meghan Howey  
Johnnie Whitfield

Andy Galuska

**NOTICE OF RIGHT OF RECONSIDERATION**

This Decision, dated September 21, 2021, is subject to the right of reconsideration pursuant to SMC 2.26.125. Reconsideration may be requested by the appellant, a party of record, or the City. Reconsideration requests must be filed in writing with the City Clerk/Treasurer not later than 5:00 p.m., local time, on the seventh calendar day after the date of mailing of this Decision. Any reconsideration request shall specify the error of law or fact, procedural error, or new evidence which could not have been reasonably available at the time of the hearing conducted by the Examiner which forms the basis of the request. Any reconsideration request shall also specify the relief requested. See SMC 2.26.125 for additional information and requirements regarding reconsideration.

**NOTICE OF RIGHT OF APPEAL**

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<sup>8</sup> The official Parties of Record register is maintained by the City's Hearing Clerk.

This Decision becomes final and conclusive as of the eighth calendar day after the date of mailing of the Decision unless reconsideration is timely requested. If reconsideration is timely requested, the Examiner's order granting or denying reconsideration becomes the final and conclusive action for the City. The final action may be reviewed in Superior Court pursuant to the procedures established by Chapter 36.70C RCW, the Land Use Petition Act. Section 36.70C.040 RCW requires that any appeal be properly filed with the Court within 21 days of the issuance of the final action. Please refer to Chapter 2.26 SMC and Chapter 36.70C RCW for further guidance regarding judicial appeal procedures.

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  
CUP21-001 & VR21-001  
Vertical Bridge Site US-WA-5129**

This consolidated Conditional Use Permit and Variance is subject to compliance with all applicable provisions, requirements, and standards of the Sultan Municipal Code and standards adopted pursuant thereto. The permittee is responsible to obtain all necessary State and Federal permits and approvals required for completion of the project. In addition, development shall comply with the following special conditions:

1. Exhibit 9 is the approved Conditional Use Permit and Variances development plans (site plan). These permits apply to Assessor's Parcel Numbers 28082900200500 and 28082900201000. Substantial revisions or modifications of the approved plans are governed by SMC 16.06.030(I).
2. A Variance to SMC 16.66.070(C)(2) and SMC 16.66.080(D) is granted to permit the lattice communications tower to have a maximum height, as defined in the code, of 240 feet.
3. A Variance to SMC 16.66.090(B)(4) is granted to permit the galvanized metal lattice tower to remain unpainted.
4. A Variance to SMC 16.66.080(H) and SMC 16.66.090(B)(10) is granted to permit the leased site to be enclosed with a barbed-wire topped, chain link fence, as shown on the approved plans, without being surrounded by landscaping.
5. No other variances are either expressed or implied by this Decision.
6. Prior to construction, the Permittee shall attend a pre-construction meeting with the City.

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7. Prior to any construction activities, the Permittee shall locate all on-site utilities by calling 811.