

**Interpretation of the Director
Under Seattle Municipal Code Title 23**

Regarding the Use of the

Property at

2908 – 14th Avenue S

**DPD Interpretation No. 14-007
(DPD Project No. 3018243)**

Background

This interpretation was requested by attorney David R. Goodnight on behalf of his client CenturyLink. CenturyLink, a telecommunications company specializing in internet, television, and telephone service, has installed a telecommunications cabinet for internet service in the rear yard of residential property located on the east side of 14th Avenue South between South Forest Street and South Stevens Street in the Beacon Hill neighborhood of Southeast Seattle. The question for interpretation is whether telecommunications cabinets for internet service may be placed on the subject private property by easement and, if so, what permits are required by the Seattle Land Use Code.

Findings of Fact

1. The property addressed as 2908 14th Avenue South is described as Lot 3, Block 43, T. Hanford's Addition to South Seattle. The zoning designation is SF-5000: Single-Family Residential, with a minimum lot size of 5000 square feet.
2. The property is located on the east side of 14th Avenue South and is approximately 60 feet wide by 100 feet deep. According to aerial photos maintained by the Department of Planning and Development (DPD) and to photos in the file on the property maintained by the Code Compliance Division of DPD¹, the property is developed with a single family residence and an open, paved parking area in the rear of the lot that is accessed from the alley to the east of the site. A map of the site based on the Geocortex land use maps maintained by DPD is provided below,

¹ See DPD enforcement Case No. 1031873.

showing the property address (also identified with a small red dot), the lot lines, and the most current aerial photo in DPD records, from 2012.



3. According to a sketch superimposed on an aerial photo in the enforcement file, as well as photos of the property taken by DPD Housing and Zoning Inspector Vincent Scott, the internet equipment cabinet installed by CenturyLink on the property is in the southeast corner of the site, where automobile parking appears in the 2012 photograph above. Several devices used by CenturyLink for internet connectivity (referred to in the request filed by CenturyLink for this interpretation as “telecommunications cabinets”) have been placed inside an area approximately 10-feet by 10-feet that is enclosed by a six-foot high chain link fence with pieces of wood inserted between the links to minimize the view of the interior of the installation.
4. The installation may provide internet broadband coverage to the residence on the subject site, but it also provides coverage to a number of other residences in the vicinity. The request for this interpretation says, in part:

“Earlier this year, CenturyLink installed a telecommunications cabinet on a private easement located at 2908 14th Avenue South on Beacon Hill. The cabinet provides copper and fiber services to local customers and includes wire, cable, and equipment accessory to residential uses.”

5. On March 20, 2014, a complaint was filed with DPD's Code Compliance section concerning the CenturyLink installation. While the complaint has been entered into the DPD Hansen Project Tracking System and given a number, no formal Notice of Violation (NOV) has been issued. A site visit has been made by Mr. Scott. CenturyLink has not applied for or obtained a permit from DPD for the installation. However, Century Link has obtained an easement from the property owners for a 10-foot by 15-foot area in the southeast corner of the subject property. The easement, in part, grants the following to Qwest Corporation d/b/a CenturyLink QC:

". . . a perpetual easement to construct, reconstruct, modify, change, add to, operate, maintain, and remove such telecommunication facilities, electrical facilities, which may include power transformers and/or power vaults, as needed for Qwest equipment . . ." ²

6. After the complaint was made, CenturyLink staff met with DPD and there were also a number of e-mails discussions with DPD staff. As summarized in an e-mail dated June 27, 2014 from Diane Davis, a manager in the Code Compliance section, to Mary Taylor, CenturyLink State and Local Government Affairs Director, DPD gave CenturyLink three options to pursue obtaining compliance with City of Seattle regulations for the installation at 2908 14th Avenue South: 1) Apply for an administrative conditional use permit for the installation; 2) Request a formal interpretation of the Land Use Code for the purpose of determining how the Land Use Code would be applied to the installation; 3) DPD would issue a Notice of Violation and CenturyLink could proceed with legal resolution in the context of civil penalties litigation. CenturyLink filed its request for this Code interpretation on July 24, 2014, in which it contends that no permit is required for its installation and therefore it is in compliance with City regulations for siting of the installation.
7. Seattle Municipal Code (SMC) Section 23.84A.006 sets forth, in part, the following definitions of communication devices and utilities used in the Land Use Code:

* * *

"Communication devices and utilities (and related terms).

* * *

4. 'Communication device, accessory' means a device by which radiofrequency communication signals are transmitted and/or received, such as but not limited to whip, horn and dish antennas, and that is accessory to the principal use on the

² See easement document recorded under King County Recording No. 20130521001742.

site. Antennas and other equipment associated with major and minor communication utilities are not accessory communication devices.

* * *

6. 'Communication utility, major' means a use in which the means for radiofrequency transfer of information are provided by facilities with significant impacts beyond their immediate area. These utilities include, but are not limited to, FM and AM radio and UHF and VHF television transmission towers. A major communication utility use does not include communication equipment accessory to residential uses; nor does it include the studios of broadcasting companies, such as radio or television stations, which shall be considered offices even if there is point-to-point transmission to a broadcast tower.

7. 'Communication utility, minor' means a use in which the means for radiofrequency transfer of information are provided but do not have significant impacts beyond the immediate area. These utilities are smaller in size than major communication utilities and include two-way, land-mobile, personal wireless services and cellular communications facilities; cable TV facilities; point-to-point microwave antennas; FM translators; and FM boosters with under ten watts transmitting power. A minor communication utility does not include wire, cables, or communication equipment accessory to residential uses; nor does it include the studios of broadcasting companies, such as radio or television stations, which shall be considered offices even if there is point-to-point transmission to a broadcast tower."

8. Section 23.84A.040 also provides the following definitions of terms relating to "use" and "utility" as follows:

* * *

"'Use' means the purpose for which land or a structure is designed, built, arranged, intended, occupied, maintained, let or leased.

'Use, accessory' means a use that is incidental to a principal use.

'Use, conditional' means a use or other feature of development that may be permitted when authorized by the Director of the Department of Planning and Development ('administrative conditional use'), or by the Council ('Council conditional use'), pursuant to specified criteria.

* * *

'Use, principal' means a use that is not incidental to another use.

'Utility' means a use in which power, water or other similar items are provided or transmitted; or sewage is treated, or solid waste is stored, transferred, recycled or incinerated. High-impact uses and utility lines are not considered utilities. Subject to the foregoing exclusions, utilities include but are not limited to the following uses:

1. 'Communication utilities, major.' See 'communication devices and utilities.'
2. 'Communication utilities, minor.' See 'communication devices and utilities.'

* * *

8. 'Utility services use' means a utility use that provides the system for transferring or delivering power, water, sewage, storm water runoff, or other similar substances. Examples include electrical substations, pumping stations, and trolley transformers.

9. Section 23.84A.036 includes the definition of "structure" as follows:

"'Structure' means anything constructed or erected on the ground or any improvement built up or composed of parts joined together in some definite manner and affixed to the ground, including fences, walls and signs, but not including poles, flowerbed frames and such minor incidental improvements.

Section 23.44.014 sets forth yard requirements for the Single-Family zones.

Subsection 23.44.014.D provides in part as follows:

"Exceptions from standard yard requirements. No structure shall be placed in a required yard except pursuant to the following:"

10. Section 23.44.002 provides as follows:

"This chapter [23.44] details those authorized uses and their development standards which are or may be permitted in the three (3) single-family residential zones: SF 9600, SF 7200 and SF 5000. Communication utilities and accessory communication devices except as exempted in Section 23.57.002 are subject to the regulations in this chapter and additional regulations in Chapter 23.57."

Section 23.44.006 lists the principal uses permitted outright in single-family zones. This section does not list communication devices and utilities or utility service uses as uses permitted outright in the single-family zones. Administrative conditional uses are listed in Sections 23.44.018 through 23.44.032, and these sections do not list communication devices and utilities or utility service uses as conditional uses in the single-family zones. Section 23.44.036 addresses "public facilities in single-family zones and provides as follows:

"Public facilities may be permitted in single-family zones according to the provisions of Section 23.51A.002 and the provisions of Chapter 23.76, Subchapter III, Council Land Use Decisions. Public facilities include, but are not

limited to, police precinct stations, fire stations, public boat moorages, and *utility services uses.*" [Italics added.]

11. SMC Chapter 23.57 sets forth regulations for Communications. Section 23.57.002 provides in part:

"A. The provisions of this chapter apply to communication utilities and accessory communication devices in all zones where permitted."

Section 23.57.010 further provides in part as follows:

"23.57.010 Single Family and Residential Small Lot zones

A. Uses Permitted Outright.

1. Amateur radio devices accessory to a residential use that meet the development standards of subsection 23.57.010.E are permitted outright.
2. Minor communication utilities are permitted outright on existing freestanding major or minor telecommunication utility towers. Minor communication utilities locating on major communication utility towers are subject to the limitations of Sections 23.57.003 and 23.57.005

B. Accessory Communication Devices.

1. Communication devices, regulated by this chapter pursuant to Section 23.57.002, that are accessory to residential uses and meet the development standards of subsection 23.57.010.E are permitted outright;
2. Communication devices on the same lot as and accessory to institutions, public facilities, public utilities, major institutions and nonconforming residential uses, that meet the development standards of subsection 23.57.010.E are permitted outright.

C. Uses Permitted by Administrative Conditional Use.

1. The following may be permitted by Administrative Conditional Use, pursuant to criteria listed in subsection 23.57.010.C.2, as applicable:
 - a. The establishment or expansion of a minor communication utility, unless the minor communication utility is permitted outright on an existing freestanding major or minor communication tower, except on lots zoned single -family or Residential Small Lot and containing a single family dwelling or no use.
 - b. Mechanical equipment associated with minor communication utilities whose antennas are located on another site or in the right-of-way, where the equipment is completely enclosed within a structure that meets the development standards of the zone. The equipment shall not emit radiofrequency radiation, and shall not result in the loss of a dwelling unit. Antennas attached to City-owned poles in the right-of-way shall follow the terms and conditions contained in Section 15.32.300."

12. Section 23.42.010 provides as follows:

“23.42.010 Identification of principal permitted uses.

Principal uses not listed in the respective zones of Subtitle III, Division 2 of SMC Title 23, Land Use Code shall be prohibited in those zones. If a use is not listed, the Director may determine that a proposed use is substantially similar to other uses permitted or prohibited in the respective zones, therefore, and should also be permitted or prohibited.”

13. Section 23.40.002 further provides in part as follows:

“23.40.002 Conformity with regulations required

A. The establishment or change of use of any structures, buildings or premises, or any part thereof, requires approval according to the procedures set forth in Chapter 23.76, Procedures for Master Use Permits and Council Land Use Decisions . . . ,

* * *

B. No use of any structure or premises shall hereafter be commenced, and no structure or part of a structure shall be erected, moved, reconstructed, extended, enlarged or altered, except in conformity with the regulations specified in this title for the zone and overlay district, if any, in which it is or will be located.”

* * *

Table A for Section 23.76.004 further provides that “uses permitted outright” are a Type I land use decision requiring a Master Use Permit.

Conclusions

1. The CenturyLink installation on the property addressed as 2908 14th Avenue South is a collection of equipment cabinets used for internet connectivity. It is clear from information provided by CenturyLink that the installation serves multiple residences in the immediate neighborhood. See Findings of Fact Nos. 3 and 4. Under the definitions of accessory and principal use set forth in Finding of Fact No. 8, the installation is not accessory to the house on the lot but instead is an installation that serves multiple houses in the vicinity. As such, it is a separate principal use on the lot, rather than an accessory use incidental to the single family residence, such as a garage, tool shed, or swimming pool. The CenturyLink installation is a 10-foot by 10-foot compound containing several “cabinets” or devices surrounded by a fence approximately six feet in height. See Finding of Fact No. 3. CenturyLink itself refers to this installation as a “telecommunications cabinet” (Findings of Fact Nos. 3 and 4).

2. The Land Use Code provides DPD with authority to determine whether a use not listed in the Code is “substantially similar to other uses permitted or prohibited in the respective zones” per Section 23.42.010 (Finding of Fact No. 12.) The internet installation is clearly a utility, which the Code defines in Section 23.84A.040 as a use in which water, power of other similar items are provided or transmitted. The Code supplements this broad definition with additional definitions in the same section identifying “Communication utilities, minor” and “utility service” uses as two types of utility uses. Section 23.40.002 further gives DPD authority to require a permit pursuant to the procedures of SMC Chapter 23.76 for the establishment of a use or construction of a structure on a parcel of property. (See Finding of Fact No. 13.)
3. The definitions of “accessory communication device” and “minor communication utility” in Section 23.84A.006 both state that these uses involve “radiofrequency transfer of information” The definition of “minor communication utility” also says that such utilities include various wireless facilities but also cable TV facilities. The definitions exclude wire, cables, or communication equipment accessory to residential uses. (See Finding of Fact No. 7.) The definitions do not specifically address or define internet broadband installations, but the CenturyLink installation is not limited to wire, cables or communication accessory to the residential use on the same lot. Instead, it is a collection of equipment cabinets affixed to the ground and surrounded by a fence.³ It is most reasonable to conclude, under the definitions in 23.84A.006 and under Section 23.42.010, that the internet equipment cabinet facility is a minor telecommunication use, subject to the regulations for single family zones in Sections 23.44.002, 23.44.006, 23.44.018 through 23.44.032, 23.57.002, and 23.57.010 (see Findings of Fact Nos. 10 and 11). The facility is most similar to other types of listed minor telecommunications uses, and this path of analysis best resolves the issue of how to permit the facility in a Single-Family zone.
4. If the internet cabinet facility is a minor telecommunications use, it is permitted on the property as a separate principal use from the existing single family residence. Sections 23.44.006 and 23.44.018 through 23.44.022 set forth the uses permitted outright and uses permitted as conditional uses in Single-Family zones. While these sections do not list telecommunications facilities, Section 23.44.002 says that the additional regulations of Chapter 23.57, Communications, also apply to Single-Family zones. Chapter 23.57 provides more specific regulations for the types of communication utilities that are allowed in Single-Family zones. (Finding of Fact No. 11). Section 23.57.010.C specifically states that minor communication utilities are permitted by administrative conditional use, and subsection C.1.b allows mechanical equipment associated with minor communication utilities whose antennas are

³ This facility thus also meets the definition of “structure” per Section 23.84A.036 (Finding of Fact No. 9).

located on another site or in the right of way, to be permitted on a single family lot if enclosed within a structure that meets the development standards of the zone.

5. The internet cabinet enclosure does not precisely fit the description in the Code of equipment associated with a minor communication utility, with “antennas located on another site.” However, Section 23.57.010.C.1.b, read together with Section 23.42.010, offers the most reasonable permitting path to establish the use, in the absence of more specific definitions and regulations in the Seattle Land Use Code for internet service facilities.
6. CenturyLink contends that its use is different from a wireless telecommunication facility more specifically regulated by Chapter 23.57 and that its use is not defined as a minor telecommunication facility. CenturyLink then simply jumps to the argument that since its use is not listed or regulated in the Code, it must not require a permit. Such a conclusion ignores the plain language of Sections 23.44.006 and 23.44.018 through 23.44.022, which do not include any listing of internet cabinets in the list of permitted or conditional uses in the Single-Family zones. Moreover, such reasoning ignores or seeks to set aside DPD’s authority to require a permit and to regulate an undefined use as most similar to another use that is defined, per Sections 23.42.010 and 23.40.002. Under Table A for 23.76.004, even uses permitted outright require a permit from DPD. (See Finding of Fact No. 13.) CenturyLink’s line of reasoning could just as easily lead to the conclusion that the use is not defined or regulated and is thus prohibited, absent specific language in the Code to address their use. Prohibition is not a desirable policy outcome, assuming the policy is to facilitate better internet service to the residents of the City of Seattle.
7. CenturyLink’s argument that permits are not required for their facilities also includes the argument that internet cabinet facilities can be placed anywhere on private property, without any development standards to regulate their location. This argument is contrary to plain language in the Code. The internet cabinet facility meets the definition of “structure” under Section 23.84A.036 (Finding of Fact No. 9) because it is an “improvement built up or composed of parts joined together . . . and affixed to the ground, including fences” Under Section 23.44.014.D, also cited in Finding of Fact No. 9, structures must meet yard requirements or qualify for one of the exceptions, regardless of whether a permit is required.
8. Even if internet cabinet facilities are not analyzed as a minor communication utility use, they are clearly a type of utility and thus must fall within some other listed definition of “utility” in Section 23.84A.040. That section lists a variety of utilities but, if the internet cabinet facility is not a telecommunications use, the closest definition is a “utility services use,” which is a “system for transferring or delivering power, water, sewage, storm water runoff, or other similar substances.” The

internet cabinet facility essentially delivers a form of “power” to computers and other electronic devices in multiple nearby homes, so this system could be viewed as analogous to an electric power supply, for example. If so, such a use is only permitted in Single-Family zones if it is a “public facility.” (See Finding of Fact No. 10.) Private utility service uses are not permitted. This interpretation of the Code would prevent CenturyLink, a private company, from setting up internet services in Single-Family zones and possibly other residential zones, as well. Since this result is not desired or reasonable from a policy perspective, and currently lacking Code language that permits the internet cabinets outright, the conditional use process is currently the appropriate permit pathway under the existing Code language.

DECISION

Equipment cabinets for internet connectivity are appropriately classified under current Land Use Code regulations as a type of telecommunications use and appropriately classified, in the absence of more specific definitions, as a use most similar to a minor communication utility use. Under this regulatory approach, they are permitted in Single-Family zones through the administrative conditional use process. CenturyLink should apply for a conditional use permit to legalize its facility on the property addressed as 2908 14th Avenue South.

Entered this 30th day of October, 2014.

(signature on file)

William K. Mills, Land Use Planner Supervisor
Department of Planning and Development

WKM/14-007