



BRICKLIN & NEWMAN LLP
lawyers working for the environment

Reply to: Seattle Office

September 21, 2023

City of Walla Walla Development Services
55 East Moore Street
Walla Walla, WA 99362

Via Email To: permits@wallawallawa.gov

Re: Application of J5IP for a Conditional Use Permit for the Construction of a New Wireless Communication Facility Located at 928 Sturm Avenue (File# CUP-22-0002; SEPA File: SEP-22-0020)

Dear Hearing Examiner:

Our firm represents Everett and Barbara Knudson, who live at 1011 Home Avenue in Walla Walla. The Knudson's property abuts the lot proposed for the new wireless communication facility (herein, "cell tower"). The Knudson's, together with many members of the public in the neighborhood of the proposed cell tower, oppose the application.

City staff did not recommend approval of the conditional use permit sought by the applicant. The Examiner should deny the condition use permit application because the applicant has not carried its burden to demonstrate compliance with the permit application requirements, siting criteria, and development standards for wireless communications facilities in Chapter 20.170 WWMC. In particular, the applicant failed to make the required comprehensive effort to identify alternative locations and co-location opportunities that are technically feasible, available, and otherwise suitable for the proposed wireless communication services. The comprehensive effort is especially important when a cell tower is proposed in the Neighborhood Residential zone—a zone that ranks next to last on the city's list of preferable sites for cell towers.

Because federal law (which preempts local ordinances) allows cell towers to be expanded after construction by 10% or 20 feet (whichever is greater), without any avenue for the city to block that later expansion, the city must treat the application for a 65' cell tower as an application for an 85' cell tower. Accordingly, if the cell tower is permitted, it must be set back 85' from all property boundaries.

Nor does the application comply with the conditional use review criteria under Chapter 20.216 WWMC. The proposed cell tower would not be compatible and in harmony with the residential area in which it is proposed to be located.

Moreover, it is doubtful that there is a real need for this new cell tower—according to the FCC, the area around the proposed cell tower already has complete 4G LTE coverage (including complete coverage by AT&T).

I. THE PROPOSED PROJECT DOES NOT COMPLY WITH CHAPTER 20.170 WWMC (WIRELESS COMMUNICATION FACILITIES)

A. The Applicant Failed to Make Comprehensive Efforts to Identify Alternative Sites and Co-location Opportunities.

The purpose of the city’s wireless communications facilities ordinance is to “to preserve neighborhood aesthetics and reduce visual clutter in the community” by encouraging the siting of these facilities “on existing buildings or structures” and encouraging the “co-location of communication facilities.” WWMC 20.170.010.

To that end, Chapter 20.170 WWMC requires the applicant to submit with its application package a “complete discussion” of why the applicant “selected the proposed site, including technical analysis, which explains why other sites are not satisfactory for the proposed facility[.]” WWMC 20.170.032(E)(1). The application must also include a complete discussion explaining “why co-location is not technically feasible, unavailable, or is otherwise unsuitable[.]” WWMC 20.170.032(E)(2). “Applications *shall* be required to provide documentation that *comprehensive efforts* to identify alternative locations were made.” WWMC 20.170.070(A)(1) (emphasis supplied).

The applicant’s failure to make that comprehensive effort is especially egregious here, because this proposed tower would be located in the Neighborhood Residential Zone, which is ranked next to last on the city’s list of the most preferable zones for cell towers. WWMC 20.170.040(C). Moreover, the maps of 4G LTE coverage in the area around the applicant’s proposed site prepared by AT&T and the Federal Communications Commission show complete 4G LTE coverage with no gaps, so there does not appear to be any actual need for this cell tower.

This application failed to comply with WWMC 20.170.032(E)(1–2). The city noted this failure, stating in its July 7, 2023 letter to the applicant requesting additional information found at Staff Report Exhibit II pages 252–257, PDF pages 266–271/521¹ (“July 7, 2023 Request for Additional Information”):

Below is a written description of the information/materials the city requested verbally on March 31, 2023.

1. Walla Walla Municipal Code 20.170.070(A)(1) requires that “Applications shall be required to provide documentation that comprehensive efforts to identify alternative locations were made.”

¹ We will refer to pages in the exhibit to the Staff Report by their PDF page numbers, for convenience.

The applicant has provided some documentation of its efforts to identify alternative location for the citing of its wireless facility including an “Alternative Site Analysis” provided on February 21, 2023. As stated verbally in the March 31, 2023, virtual meeting, it is staff’s position that this documentation does not adequately show the “comprehensive efforts” of the applicant. Thus, additional information and documentation showing the “comprehensive efforts” to identify alternative locations for the siting of its facilities must be provided by the applicant. Such information and documentation shall at a minimum include:

1. The name and title of the person(s) contacted.
2. Documentation on the method used to contact them (letters, phone, email, visit, etc.)
3. Date(s) of the contact(s)
4. How was this response documented (returned phone call, email, meeting)
5. Comprehensively described results of applicants attempts to identify alternative siting locations.

July 7, 2023 Request for Additional Information, Staff Report Exhibit II at PDF page 267/521. But even after the city put the applicant on notice that this information was missing from the application, the applicant failed to provide it.

On July 18, 2023, after receiving the city’s request for additional information, the applicant submitted a revised Alternative Sites Analysis. Staff Report Exhibit I at PDF pages 240–249/521. That revised analysis failed to state the name and title of the person(s) contacted, failed to include copies of the letters that were purportedly sent to those unnamed persons, and failed to comprehensively describe the results of the applicant’s attempts to identify alternative siting locations. Staff Report Exhibit I at PDF page 246/521.

The information that the applicant did provide shows that its effort to identify alternative sites and co-location opportunities were cursory, at best. For example, one of the potential co-location sites is the radio tower at Whitman College located at 200 Boyer Ave. The applicant claims that it sent a letter to the “owner” of this radio tower, which the applicants states is “ASWC Radio Committee.” Staff Report Exhibit I at PDF page 246/521. But the ASWC Radio Committee is part of the student-run college radio station KWCW, “a freeform, student-run, non-profit college radio station broadcasting from Whitman College.”² When the applicant purportedly sent its letter to the ASWC Radio Committee on March 13, 2020, the nation was in the midst of the Covid-19 pandemic. It is unlikely that a student radio committee was checking its mail. Even if the Whitman

² <https://kwcwradio.tumblr.com/about>. Last visited September 19, 2023.

college students were picking up the mail for the ASWC radio committee, they would not have been authorized to respond to a co-location request.

Similarly, none of the other “owners” listed by the applicant at Staff Report Exhibit I at PDF page 246/521 are persons. The applicant apparently just mailed out form letters to organizations and businesses without bothering to address those letters to any particular person, not surprisingly received no response to most of the letters, and decided that was enough.

It was and is not enough. The development standards for wireless support structures and antennas (*i.e.*, cell towers) are clear: “Applications *shall* be required to provide documentation that *comprehensive efforts* to identify alternative locations were made.” WWMC 20.170.070(A)(1) (emphasis supplied). Here, the applicant’s efforts were cursory, not comprehensive. The city even stressed this requirement to the applicant in its July 7, 2023 request for additional information, but the applicant still failed to comply.

Moreover, the applicant failed to even identify some potential alternative sites and co-location opportunities whatsoever. For example, the existing cell tower at Leonetti Cellar located at 1278 Berney Drive is available for co-location, but the applicant never contacted Leonetti Cellar. Another example is the DISH Wireless tower, which is a permitted, 100-foot tall tower on a vacant field at 2301 Russell Creek Road (tax parcel 360727440004). The tower received a conditional use permit from the Hearing Examiner (Gary McLean) on Oct. 19, 2022 (File No CUP22-010 & CAP22-014). The tower is not yet built, but is a possible co-location option. (For instance, the tower owner may be waiting for other lease revenues before constructing the tower.) The applicant identified this alternative site but rejected it, stating “collocation opportunity is currently speculative” at the site. Staff Report Exhibit I at PDF page 249/521. But the applicant did not contact the owner about co-location opportunities.

Local residents with personal knowledge of the neighborhood have identified many other potential alternative sites and co-location opportunities, none of which (except for the DISH Wireless tower) were identified by the applicant. Nor did the applicant make any effort to contact the owners of these potential alternative sites and co-location opportunities. *See* Attachment A to this comment letter (list of alternative sites and co-location opportunities). The Examiner should find and conclude that the applicant failed to make the comprehensive effort to identify alternative locations required by WWMC 20.170.070(A)(1) and deny the application.

B. The City Lacks Necessary Information on Whether the Applicant’s Needs Can Be Met at an Alternative Location or through Co-location.

The documentation of an applicant’s comprehensive effort to identify alternative locations and co-location opportunities is very important in Walla Walla, because “[p]lacement of an antenna support structure *shall be denied* if the antenna support needs can be met by co-location on an existing antenna support structure or by mounting on an alternative antenna support structure which already supports an attached antenna.” WWMC 20.170.070(A)(1).

The comprehensive effort to identify alternative locations and co-location opportunities is especially important for this application, because the applicant's proposed tower is in the Neighborhood Residential zone. The general siting criteria for cell towers are set out at WWMC 20.170.040. Those siting criteria "are necessary to encourage the siting of those facilities in locations most appropriate based on land use compatibility, neighborhood characteristics, and aesthetic considerations." WWMC 20.170.040(A). The city lists seven types of site location for cell towers, in decreasing order of preference. Of those seven types, "neighborhood residential" is number 6, the least preferable site location except for the catch-all "other sites." WWMC 20.170.040(C).

"Co-location on existing antenna support structures or alternative antenna support structures *is required* if technically feasible, available, and otherwise suitable for the proposed wireless communication services." WWMC 20.170.040(B) (emphasis supplied). "Further, attachment of antennas to existing nonresidential structures and buildings primarily within industrial, and commercial zoning districts is preferable to additional antenna support structures." *Id.* Here, the applicant's failure to identify alternative locations and co-location opportunities, let alone its failure to make a "comprehensive effort" to identify them, prevents the city from assessing whether there are technically feasible, available, and otherwise suitable alternatives for the proposed cell tower at locations that are more preferable than this location in the Neighborhood Residential zone, near existing and planned residential uses.

C. The City Should Have Hired a Qualified Expert at the Applicant's Expense to Assess Alternative Locations and Co-Location Opportunities.

The code provides a way for the city to get an unbiased assessment of alternative locations and co-location opportunities. "The city may request feasibility studies associated with applications for wireless communication facilities which demonstrate that locations on existing structures have been explored as the preferred siting alternative. The cost of such studies shall be the responsibility of the applicant." WWMC 20.170.040(B). Similarly: "The city may retain qualified experts to review application materials submitted by an applicant, and to provide technical and other advice to the city in considering issuance of requested authorizations and permits. . . . Applicants shall be responsible for reasonable costs actually incurred by the city under this subsection." WWMC 20.170.040(D).

Given the obvious failure of the applicant to provide a comprehensive assessment of co-location options, the city should have retained a qualified expert to assess whether "locations on existing structures have been explored as the preferred siting alternative," and whether the applicant made a comprehensive effort to do so. The city put the applicant on notice of the lack of a comprehensive effort in its July 7, 2023 request for additional information and the applicant again failed to provide the requested information in its July 18, 2023 Alternative Sites Analysis. In light of that, the city's decision not to retain a qualified expert at the applicant's expense to review the application and advise the city is inexplicable.

D. The City Must Consider the Application as an Application for an 85-Foot-Tall Tower.

“Wireless communication facilities, antenna support structures, and all related structures are prohibited on properties zoned neighborhood residential (RN) or multifamily residential (RM) unless: . . . b. The wireless communication facility and antenna support structure must comply with the height and setback limitations of Section 20.170.070(D).” WWMC 20.170.050(A)(1).

The development standards at WWMC 20.170.070(D), in turn, require a setback equal to the tower’s height: “The wireless communication facility, antenna support structure and all related structures shall be set back a distance equal to the height of the wireless communication facility from the nearest residential lot line.” WWMC 20.170.070(D)(1)(a). “The combined antenna support structures and attached antennas shall have a maximum height of sixty-five feet from the existing grade.” WWMC 20.170.070(D)(1)(b).

While the city’s code appears to limit the proposed cell tower’s height to 65 feet, federal law preempts local ordinances and entitles AT&T, or any other carrier such as T-Mobile or Verizon, to add to this tower and expand it horizontally and vertically by up to 20 feet in each direction, regardless of any local zoning restrictions.³ The already-proposed height of 65 feet would cause the facility to extend well above any of the nearest buildings. The city must now consider the impact of an 85-foot tower, because a federal statute expressly declares that “a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”⁴

The applicant is very likely to take advantage of the 20-foot height expansion authorized by federal law, because more “tower real estate” means more income for the applicant. The city will not be able to prevent that subsequent expansion under its preempted local ordinance. But the city can take that subsequent expansion into account now.

The city should assume that both the height and “drip line” (width) of the proposed tower will expand by 20 feet over what is currently proposed. That means that the proposed cell tower must be set back at least 85 feet from the nearest property line, to comply with WWMC 20.170.070(D)(1)(a). As to the 20-foot increase in width, the exclusionary fencing around the installation must be large enough to enclose the expanded “drip line” of the cell tower—and the minimum 85-foot setback from the nearest property line should be measured from that expanded drip line.⁵

³ 47 C.F.R. § 1.6100(b)(7)(i),(ii).

⁴ 47 U.S.C. 1455(a)(1). The statutory phrase “substantially change the physical dimensions” is implemented by regulation at 47 C.F.R. § 1.6100(b)(7)(i),(ii). Those regulations state that increasing tower height by up to “10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater” does not substantially change the physical dimensions of an existing tower.

⁵ See July 7, 2023 Request for Additional Information, Staff Report Exhibit II at PDF page 268/521:

II. THE PROPOSED PROJECT DOES NOT COMPLY WITH CHAPTER 20.216 WWMC (CONDITIONAL USE)

The purpose of conditional use review is “to insure that, if approved, the use will be reasonably compatible with surrounding uses permitted in the area.” WWMC 20.216.010. “There may be situations in which the conditions necessary to proper placement of a Conditional Use cannot be developed at a particular site. For this reason, nothing contained [in the city’s municipal code] shall be construed to require the Hearing Examiner to authorize a Conditional Use Permit.” *Id.*

The proposed 65-foot cell tower (expandable under federal law to 85 feet) is not compatible with the surrounding residential uses in the Neighborhood Residential zone. It would tower over neighboring properties, causing a severe adverse aesthetic impact. It would be noisy. Its diesel generator would spew fumes and particulates. Hawks and owls that currently nest in and hunt from the highest nearby trees would likely move to the higher tower, endangering nestlings and adult birds. Testimony at the hearing will provide substantial evidence in support of all of these facts.

The city’s conditional use review criteria at WWMC 20.216.040(A) specifically require:

“1. That the use will not endanger the public health or safety if located and developed where proposed, and that the use will not allow conditions which will tend to generate nuisance conditions to adjoining properties;”

The applicant has not carried its burden to show that this criterion is met. The diesel tanks and high voltages at the tower could present a fire danger. Ice that is shed from the tower during ice storms could endanger children who play on the playground of the day care on the adjacent church property.⁶ Noise and diesel fumes from the facility will likely interfere with the ability of neighboring residential property owners to use and enjoy their residential properties.

These impacts should have been (and perhaps were) considered in the Environmental Technical Memo prepared for the applicant by PBS Engineering and Environmental Inc. Staff Report Exhibit

WWMC 20.170.070(D)(a) requires the “wireless communication facility, antenna support structure and all related structures to be set back a distance equal to the height of the wireless communication facility from the nearest residential property line.” The submitted site plan is currently drawn to show that only the fence is lying at 65 feet from the southern residential property line; however, the mono-pine structure is clearly hanging over the facility fence a certain unmeasured amount. The applicant must show the “drip line” of the proposed mono-pine on the site plan drawing and demonstrate that the entire wireless communications facility, which includes the entire mono-pine (measured from the drip line), is a minimum 65-foot setback from the residential property line.

⁶ This day care or day school, called “The Ark,” was mentioned repeatedly in public comments opposing the application, but is not addressed or even mentioned in the city’s staff report. The playground associated with this day school is adjacent to the proposed cell tower location.

I at PDF pages 70–79/521. But the applicant omitted most of the pages of this Environmental Technical Memo in its submission to the city. The narrative text portion of this Environmental Technical Memo is 18 pages long and is signed on page 18 (Staff Report PDF page 75). But the applicant only provided pages 1, 3, 11, and 18 of this Environmental Technical Memo to the city. That begs the question: What was on the pages omitted by the applicant? The Environmental Technical Memo itself states: “This report should be read in its entirety (text and attachments) *before decisions are made* based on the findings provided in the Executive Summary. PBS is not responsible for utilization of less than the complete report.” Staff Report Exhibit I at PDF page 72/521 (emphasis supplied).

“2. That the location and character of the use, if developed according to the plan as submitted and approved or conditionally approved, will be compatible and in harmony with the area in which it is to be located;”

The applicant has not carried its burden to show that this criterion is met. The proposed 65-foot cell tower (expandable under federal law to 85 feet) is clearly not compatible and in harmony with the residential area in which it is to be located. The area in which the tower is proposed consists of residential homes, a church, and protected natural/critical areas. The proposed tower would loom over the nearby homes (including the homes that are platted on the parcel to the south of the proposed cell tower, but not yet built). The extensive public comments in opposition to the proposed cell tower help demonstrate its incompatibility with the preexisting surrounding uses.

“4. That the use meets all required conditions and specifications set forth in the zone where it proposes to locate.”

The applicant has not carried its burden to show that this criterion is met. As discussed above, in this Neighborhood Residential zone cell towers are limited to 65 feet in height and must be set back from the nearest property line at least as far as the tower is high. WWMC 20.170.050(A)(1); WWMC 20.170.070(D)(1)(a-b). But if a 65-foot tower is permitted and built at this location, the applicant will be able to take advantage of federal law to expand the tower by adding 20 feet to its height and width/drip line. 47 C.F.R. § 1.6100(b)(7)(i),(ii); 47 U.S.C. 1455(a)(1). The city will not be able to prevent that expansion, because local ordinances are preempted by that federal law.

Essentially, in light of that federal law, if the city permits a 65-foot tower, it is also permitting an 85-foot tower (and a wider tower). An 85-foot tower violates the required conditions and specifications set forth in the Neighborhood Residential zone.

The city requires a setback at least equal to tower height for the good reason that a tower falling over should not put neighboring parcels at risk. For similar reasons the city should require the tower to be set back at least 85 feet from powerlines, the forested tree line, and all critical areas.

III. THE AREA THAT WOULD BE SERVED BY THE PROPOSED CELL TOWER ALREADY HAS COMPLETE 4G LTE COVERAGE

The applicant asserts: “Currently, the target coverage area has minimal to no 4G service and does not have adequate 4G LTE service.” That must be news to consumers who rely on AT&T’s coverage maps when choosing a cellular provider. Those AT&T coverage maps, posted on AT&T’s website, show existing 4G LTE coverage everywhere around the proposed site at 928 Sturm Avenue with no gaps.⁷

AT&T’s assertion would also be news to the Federal Communications Commission. According to the FCC, the area around the proposed cell tower already has complete 4G LTE coverage, including complete 4G LTE coverage by AT&T.⁸

There does not appear to be an actual, current coverage gap or a need for the proposed new cell tower at this location.

IV. CONCLUSION

For the reasons set forth above, the Hearing Examiner should deny the conditional use permit application because the applicant has not met its burden to demonstrate compliance with the permit application requirements, siting criteria, and development standards for wireless communications facilities in Chapter 20.170 WWMC. Nor has the applicant met its burden to demonstrate compliance with the conditional use review criteria in Chapter 20.216 WWMC. Nor does it appear that the proposed new cell tower is needed to fill any existing coverage gap.

Very truly yours,

BRICKLIN & NEWMAN, LLP



Zachary K. Griefen
Counsel for Everett and Barbara Knudson

⁷ <https://www.att.com/maps/wireless-coverage.html>. Last visited September 19, 2023.

⁸ https://broadbandmap.fcc.gov/location-summary/mobile?version=dec2022&lon=-118.30772&lat=46.05946&addr_full=928+Sturm+Street%2C+Walla+Walla%2C+Washington+99362%2C+United+States&zoom=15.29&vlon=-118.311075&vlat=46.059433&env=0&tech=tech4g. Last visited September 19, 2023.

ATTACHMENT A

**BUILDINGS WITH POSSIBLE
COLOCATION OPPORTUNITIES**

Buildings with possible colocation opportunities		Identified by Applicant?	Contacted by Applicant?
450 Bridge St	Pioneer Middle School	NO	NO
933 Alder	Edison Middle School	NO	NO
717 Alder	Amazing Grace Church	NO	NO
150 Park	Fouts Center	NO	NO
109 S Palouse	Carnegie Center	NO	NO
364 Boyer	Baker faculty Center	NO	NO
534 Boyer	Odd Fellows	NO	NO
13 S Clinton	Clinton Court Apartments	NO	NO
2 East Birch	Washington Apartments	NO	NO
111 East Birch	YWCA	NO	NO
340 S Park	YMCA	NO	NO
73 Palouse	1st Congregational Church	NO	NO
102 S 1st	Armory Building	NO	NO
66 S Palouse	Covenant Presbyterian Church	NO	NO
216 S Palouse	Pacific NW Family Law	NO	NO
248 Birch	Birchway Apartments	NO	NO
323 Catherine	St Paul's Episcopal Church	NO	NO
352 1st Ave	Brentwood Apartments	NO	NO
325 1st Ave	Walla Walla Presbyterian Church	NO	NO
214 1st Ave	Windemere	NO	NO
112 S First	Walla Walla Union Bulletin	NO	NO
103 S 2nd	Lloyds building	NO	NO
1001 Howard	Community Church	NO	NO
427 1st St	Apartments	NO	NO
1025 S 2nd	Providence South Gate	NO	NO
1111 S 2nd	Providence medical group	NO	NO
1132 S 2nd	Evangelical Baptist Church	NO	NO
Vacant Land	Off of Isaacs between Tausic Way and Wilbur sits about 50 to 100 acres of City owned land.	NO	NO
Towers	Leonetti tower (existing) has colocation opportunities	NO	NO
	Kendal Road Tower (existing) colocation opportunities unknown at this time	NO	NO
	Dish Tower (permitted, not built) is shown in the RF analysis report	YES	NO