

Pamela Ransier

From: Zachary Griefen <griefen@bnd-law.com>
Sent: Friday, September 29, 2023 4:30 PM
To: Permits
Cc: Barbara Knudson; Dave Bricklin
Subject: Knudson Supplemental Comments Re: Application of J5IP for a Conditional Use Permit for the Construction of a New Wireless Communication Facility Located at 928 Sturm Avenue (File No. CUP-22-0002; SEPA File: SEP-22-0020)
Attachments: 2023 09 29 Griefen to Hearing Examiner (Knudson Supplemental Comment Letter).pdf

Dear Mr. Mayland,

Please find attached the supplemental written comments of the Knudsons regarding the Wireless Communication Facility proposed to be located at 928 Sturm Avenue (File No. CUP-22-0002; SEPA File: SEP-22-0020).

Thank you.

Zak Griefen



Zachary Knox Griefen

Associate Attorney

Bricklin & Newman, LLP

123 NW 36th Street, Suite 205, Seattle, WA 98107

206.264.8600 | griefen@bnd-law.com | www.bricklinnewman.com



BRICKLIN & NEWMAN LLP
lawyers working for the environment

Reply to: Seattle Office

September 29, 2023

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

Via Email To: permits@wallawalla.gov

Re: Supplemental Comments of Knudsons on 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 Knudsons, together with many members of the public in the neighborhood of the proposed cell tower, oppose the application. We submit these supplemental comments as authorized by the Examiner during the September 21, 2023 public hearing.

City staff did not recommend approval of the conditional use permit sought by the applicant. For good reason—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. Nor has the applicant carried its burden to demonstrate compliance with the conditional use review criteria under Chapter 20.216 WWMC.

We rely on and incorporate by reference the comment letter that we submitted on September 21, 2023, admitted during the hearing as Exhibit 12, and the statements that the Knudson's undersigned counsel made orally during the public hearing on September 21, 2023. As further explained below, the applicant failed to make or demonstrate a comprehensive effort to identify alternative locations and co-location opportunities. There were other critical errors and omissions in the application materials and in the city's staff report. The proposed cell tower would not be compatible and in harmony with the residential area in which it is proposed to be located.

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

The purpose of the city’s wireless communications facilities ordinance is to locate wireless communication facilities “so that they are consistent with the character of the city in general and the land use zones within which they are located.” WWMC 20.170.010(A). Wireless communication facilities should be sited on existing buildings or structures “to preserve neighborhood aesthetics and reduce visual clutter in the community[.]” WWMC 20.170.010(C).

A. There is No Need for this Cell Tower

This proposed cell tower would be located at 928 Strum Avenue, 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). This neighborhood already has complete cell phone voice coverage and complete 4G LTE coverage, including complete coverage by AT&T.¹ “[T]here are no current or expected future gaps in telecommunications service within Walla Walla city limits or UGA.” Walla Walla Comp Plan (2018) at PDF page 211/221. *See also* Exh. 13 at PDF 26–28 (noting the applicant’s lack of “hard data” on AT&T’s purported coverage gap).

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

To ensure that purpose of the city’s wireless communications facilities ordinance is met: “Applications *shall* be required to provide documentation that *comprehensive efforts* to identify alternative locations were made.” WWMC 20.170.070(A)(1) (emphasis supplied). *See also* WWMC 20.170.032(E)(1–2). The applicant made only cursory, not comprehensive efforts to identify alternative locations and co-location opportunities.

As described in the comment letter that we submitted on September 21, 2023, Exh. 12, and the statements that the Knudson’s undersigned counsel made orally during the public hearing on September 21, 2023, the applicant failed to make or demonstrate the required comprehensive effort. This failure began with the initial application and continued even after the city notified the applicant, verbally and in writing, that the applicant’s “documentation does not adequately show the ‘comprehensive efforts’ of the applicant.” July 7, 2023 Request for Additional Information, Staff Report Exhibit II at PDF page 267/521. City staff specifically required the applicant to provide:

1. The name and title of the person(s) contacted.
2. Documentation on the method used to contact them (letters, phone, email, visit, etc.)

¹ <https://www.att.com/maps/wireless-coverage.html>. Last visited September 19, 2023; 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.

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.

Id. But even after the city put the applicant on notice that this information was missing from the application, the applicant failed to provide it. The applicant's revised Alternative Sites 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 applicant's efforts to identify alternative sites and co-location opportunities were cursory, not comprehensive, as explained in more detail in our Sept. 21 comment letter. The applicant failed to make or demonstrate the required comprehensive efforts to identify alternative locations and co-location opportunities.

The written testimony of Mary Gibson, admitted during the Sept. 21 public hearing as Exhibit 17, confirms that the "ASWC Radio Committee" of Whitman College, to whom the applicant purportedly sent a co-location request letter on March 13, 2020, is a student committee. "ACWC" are the initials of "Associated Students of Whitman College." Exh. 17 at PDF page 2. Julie Dunn, Senior Associate Dean of Students, and advisor to the ASWC Radio Committee, told Ms. Gibson that the "ASWC Radio Committee" does not own or control the radio tower at Whitman College. *Id.* The "ASWC Radio Committee is made of students [who] have no say about the tower." *Id.* Moreover, Spring Break for Whitman College students began on March 10, 2020, so no one on the student committee would have received a letter that was purportedly mailed on March 13, 2020. *Id.*

In addition to the Whitman College radio tower and the other alternative sites discussed in our Sept. 21 comment letter, Exh. 12, the applicant studiously avoids any discussion of its recently installed antennas that are co-located on an existing tower located at 126 West Poplar Street. This tower at 126 West Poplar Street is within the original "search ring" that the applicant provided to the city. *See* Exh. 17 at PDF page 3 (discussing the applicant's original application for the 928 Strum Avenue cell tower). This original application, attached to Exh. 17 as Attachment 4 beginning on PDF page 16/27, is missing from the city's staff report).

The applicant's original search ring was "about a mile west" of 928 Strum Avenue: "The search began with a ring was [sic] about a mile west of this site. Although there may have been more suitable sites (zoning and uses), there were no owner [sic] willing to have a facility on their property." Exh. 17 at PDF page 23/27. The existing tower located at 126 West Poplar Street is about 1.5 miles west of the proposed tower at 928 Strum Avenue and would have been within that original search ring. The applicant purportedly sent out its letters to owners of potential alternative sites in March 2020 (when the search ring was still "about a mile west" of AT&T's most recent

search ring). The applicant received its permit to co-locate AT&T antennas on the existing tower 126 West Poplar Street in February 2021 (City File No. BLD-20-1272). Apparently, placing the additional AT&T antennas on the 126 West Poplar Street tower filled any coverage gap, because both AT&T's maps on its own website and the FCC's coverage maps show complete coverage in the area around 928 Strum Avenue.

See Exh. 17 at PDF page 3/27:

What the applicant did not tell us in their ".Alternative Site Analysis" is that they found a site at 126 W Poplar St, applied for a permit and built a facility inside the first search ring. (See Attachment 5) And they kept looking, well outside their original "search ring" and found another willing land-owner, the Blue Mountain Church. In later versions of the application (Attachment 6) the applicant objects to considering alternative sites outside their current search ring, which itself was over a mile outside the original search ring. The applicant has not honestly represented the facts.

In light of the applicant's failure to comply with WWMC 20.170.070(A)(1) and WWMC 20.170.032(E)(1-2), the city should have sought an unbiased opinion from one or more qualified experts, at the applicant's expense. "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).

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.

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

While the city's code appears to limit the proposed cell tower's height to 65 feet under WWMC 20.170.070(D)(1)(b), 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.² The already-proposed height of 65 feet would cause the facility to tower the Blue Mountain Church steeple and all of the nearest buildings. But the city must 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."³

² 47 C.F.R. § 1.6100(b)(7)(i), (ii).

³ 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%

The city will not be able to prevent that subsequent expansion under its preempted local ordinance. But the city can and must take that subsequent expansion into account now.

Because the city will not be able to prevent an expansion of the cell tower from 65-feet to 85-feet tall, the city must deny the application. “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). Permitting a 65-foot tower now will lead to an 85-foot tower that violates the city’s 65’ height maximum—in the least preferred Neighborhood Residential zone.

Even if the city ignores the unstoppable expansion and permits the proposed 65’ tower, the city must 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. *See* July 7, 2023 Request for Additional Information, Staff Report Exhibit II at PDF page 268/521 (explaining the “drip line” issue).

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, be noisy, and its diesel generator would spew fumes and particulates, causing a severe adverse aesthetic impact.

Testimony provided during the Sept. 21 public hearing provided substantial evidence that the proposed cell tower is not compatible and in harmony with the area in which it is to be located.

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;”

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.

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. As the testimony of Jennifer Knudson Feinstein established during the hearing, fire risk is a real concern on the block that contains the proposed cell tower site, because dangerous fires have broken out there in the recent past. *See also* Exh. 6 at PDF 7 (showing high voltage power lines in close proximity to the proposed tower); Exh. 13 at PDF 116–120 (numerous images of cell towers on fire and collapsed).

The stored diesel fuel and lead acid batteries that are proposed for the site also present a spill risk that threatens groundwater, surface waters, and nearby wells. The proposed site and many of the surrounding properties are part of the aquifer recharge area for the city of Walla Walla.⁴

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.⁵ 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. Moreover, as noted in our Sept. 21 comment letter, Exh. 12, the applicant deleted most of the pages of the 18-page Environmental Technical Memo prepared for the applicant by PBS Engineering and Environmental Inc. Staff Report Exhibit I at PDF pages 70–79/521. The applicant only provided pages 1, 3, 11, and 18 of this Environmental Technical Memo to the city.

“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 24 single family homes that are platted in Dan Preas’ Bryant Estate subdivision on the parcel to the south of the proposed cell tower, but not yet built. The Bryant Estate subdivision was approved by the city in June 2022 under City File No. PPL-22-

⁴ The proposed site is within the “Walla Walla River Shallow Gravel Aquifer Boundary Delineated by County” as shown on Walla Walla County’s critical area maps, especially the map titled “CRITICAL AQUIFER RECHARGE AREAS - 10 Year Time of Travel Zones - Southeast County,” *available at*: https://cms7files.revize.com/wallawalla/document_center/commdev/2018%20Update/Updated%20Critical%20Areas%20Maps.pdf, *last visited* September 29, 2023.

⁵ 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.

0001. The extensive public comments in opposition to the proposed cell tower help demonstrate its incompatibility with the preexisting surrounding uses.⁶

Another tangible measure of the of the proposed cell tower’s incompatibility and lack of harmony with the surrounding residential uses in this Neighbor Residential zone is the likely decrease in nearby property values if this tower is built. *See, e.g.*, Exh. 13 at PDF 45–54 (seven letters from real estate professionals, most of them local to Walla Walla, with relevant specialized knowledge opining that this cell tower would drastically reduce nearby property values).

Even more substantially, Leonard Norling testified that he and his wife wanted to purchase one of the homes in Dan Preas’ Bryant Estate 24-unit subdivision adjacent to and south of the proposed cell tower location. Hearing video⁷ beginning at timestamp 1:50:10. Mr. Norling testified that he and his wife loved the aesthetics and community at the Bryant Estate and planned to purchase a lot for their dream home in the Bryant Estate, but backed out when they learned of the proposed cell tower:

We love the Bryant Estate—the aesthetics, the trees, the community, the people . . . Mr. Preas informed us of the conditional use permit and the potential cell tower . . . [which would be] approximately 65 feet from where we would want our backyard. . . . The community is beautiful. . . . But it all goes away when you put a cell tower there. . . . It is not aesthetically pleasing. It changes the atmosphere and everything about the community. We saw . . . a 65 foot crane . . . depicting what that tower would be in height and we were appalled. We pulled out and told Mr. Preas that we do not want to build our dream home on the Bryant Estate if this cell tower is going to be there.

As in the *Sprint PCS Assets* case cited in Exh. 13 at PDF 11, Walla Walla’s code “authorizes the denial of WCF permit applications on aesthetic grounds.” *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Ests.*, 583 F.3d 716, 721 (9th Cir. 2009). The substantial evidence submitted by the neighboring opponents to the proposed cell tower demonstrate that it would not be aesthetically compatible or in harmony with the area in which it is proposed to be located. Factors “including the height of the proposed tower, the proximity of the tower to residential structures, the nature of uses on adjacent and nearby properties, the surrounding topography, and the surrounding tree coverage and foliage . . . are legitimate concerns for a locality.” *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 994 (9th Cir. 2009).

In light of those factors, there is no assurance that “adjacent properties will not be unreasonably impacted,” even with the imposition of the conditions proposed by the city, and that lack of

⁶ While community opposition cannot alone justify a land use decision, “the opposition of the community may be given substantial weight[.]” *Sunderland Fam. Treatment Servs. v. City of Pasco*, 127 Wn. 2d 782, 797 (1995).

⁷ Available at <https://vimeo.com/867306075>, last visited September 28, 2023.

assurance “shall constitute grounds for denial of the Conditional Use Permit.” WWMC 20.216.040(C).

“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. 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 federal law.

In light of that federal law, if the city permits a 65-foot tower, it is also permitting an 85-foot tower (and a 20-foot wider tower). An 85-foot tower violates the required conditions and specifications set forth in the Neighborhood Residential zone, which limit the tower height to 65 feet.

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. THERE ARE MANY ERRORS, MISREPRESENTATIONS, AND OMISSIONS IN THE APPLICATION AND THE STAFF REPORT

The applicant has submitted what it purported to complete and accurate applications to the city for this project three times, but significant errors, misrepresentations, and omissions remain. Many of those errors, misrepresentations, and omissions were not corrected or identified by city staff.

One glaring example is the omission of Dan Preas’ Bryant Estate 24-unit single family residential subdivision (City File No. PPL-22-0001) from the applicant’s maps and other application materials and the city’s staff report. The Bryant Estate subdivision is adjacent to the proposed cell tower, immediately to the south of the proposed cell tower’s location. There are images of a red crane with a red umbrella on top of the crane in Exh. 13 at PDF pages 87–90.⁸ The crane in these images is parked on the land to be developed as the Bryant Estate subdivision, just south of the property line between Dan Preas’ land and the lease area for the proposed cell tower. The crane is with umbrella is 65-feet high. The plat map for the Bryant Estate subdivision is shown in Exh. 13 at PDF page 92. The red crane shown on the preceding pages of Exh. 13 is parked just north of the top of the cul-de-sac shown on the plat map. These images clearly show that the proposed cell tower would be prominent as seen from the Bryant Estate, looking north. Neither the applicant nor

⁸ See also the pictures of this crane included in Jennifer Knudson Feinstein’s supplemental comment letter dated Sept. 28, 2023.

the city makes any mention of the Bryant Estate permitted residential subdivision in close proximity to the proposed cell tower.

Another example is the omission of any depiction or discussion of the day care or day school called “The Ark.” The day care and its playground, which is adjacent to and west of the proposed cell tower location, is not shown on any of the applicant’s site maps and it is not discussed in the city’s staff report. According to Pastor Jim Snyder of the Blue Mountain Community Church, The Ark is “the largest privately run daycare center in the Walla Walla Valley.” Sept. 28, 2023 Public comment of Pastor Jim Snyder.

The “Project overview” annotated aerial view of the proposed cell tower location, Exh. 6 at PDF page 3, omits both the Bryant Estate subdivision and the day care. Moreover, that Project overview is misleading because it only shows the distances from the proposed cell tower to neighboring *homes*, not neighboring *property boundaries*. Neighbors have a right to fully use and enjoy their entire property, not just their homes.

The map in the applicant’s power point presentation, Exh. 6 at PDF page 10, is misleading because it is drawn to omit the Leonetti Cellar and Dish Wireless towers. It also omits the existing tower at 126 West Poplar Street, where the applicant recently installed an AT&T antenna array. The Leonetti Cellar and Dish Wireless towers are also missing from the map at Exh. 6 at PDF page 9. Nor are existing structures like grain elevators that could serve as alternative locations depicted on the maps in the applicant’s materials.

The depiction of the proposed antenna array, Exh. 6 at PDF page 5, is misleading because it appears to show three antenna panels, when the applicant proposes six antenna panels. See Staff Report Exhibits at PDF page 212 (describing the project as including “INSTALLATION OF (6) AT&T PANEL ANTENNAS”). Moreover, the 20-foot height expansion allowed under federal law would provide space for additional panel antennas.

The “Phase I Site Photos” in the staff report exhibits at PDF pages 120–121 are misleading because none of the views depicted are from neighboring residences. See *Omnipoint Commc'ns, Inc. v. City of White Plains*, 430 F.3d 529, 533 (2d Cir. 2005):

First, the Board was free to discount Omnipoint's study because it was conducted in a defective manner. The study concluded that the tower “would be visible from only one property outside the Golf Course.” However, because the study was conducted without notice to the Board or community, the observation points upon which its conclusion was based were limited to locations accessible to the public—mostly public roads—and no observations were made from the residents' backyards, much less from their second story windows. Moreover, the study suffered from the further defect that it failed to consider the tower's visibility in winter, when deciduous

trees are bare. Accordingly, the study did not foreclose a finding that the tower would be widely visible.

Omnipoint Commc'ns, Inc. v. City of White Plains, 430 F.3d 529, 533 (2d Cir. 2005).

The applicant's power point presentation, Exh. 6 at PDF 12, is misleading because it asserts: "Applicant has demonstrated a significant gap in service[.]" As discussed previously and in Exh. 12, the maps prepared by AT&T and the FCC both show *no gap* in AT&T's coverage in the area of the proposed cell tower.

The many errors, misrepresentations, and omissions in the applicant's materials and the city's staff report help show that 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 or the conditional use review criteria under Chapter 20.216 WWMC.

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