

Pamela Ransier

From: Rich Busch <rich.busch@wirelesscounsel.com>
Sent: Friday, October 13, 2023 3:11 PM
To: Permits
Cc: griefen@bnd-law.com; andy@wenatcheelaw.com; Tracy@wenatcheelaw.com; Jon Maland
Subject: AT&T Rebuttal and Closing Comments CUP-22-0002
Attachments: WL4557 - AT&T Closing Brief - Combined - 2023.10.13.pdf

I have attached AT&T's rebuttal and closing comments in this matter.

I am copying counsel, staff and the Hearing Examiner's office for everyone's convenience.

Best regards,

Rich

Richard J. Busch
Busch Law Firm PLLC
22500 SE 64th Place, Suite 130
Issaquah, WA 98027
425.458.3940 Office
206.265.3821 Wireless
rich.busch@wirelesscounsel.com
www.wirelesscounsel.com

This message may contain confidential Attorney/Client communication, or attorney work product. If you have received this e-mail in error, please call (425) 458-3940 to report the error, and delete this message from your system. Thank you.



VIA E-MAIL TO:

permits@wallawallawa.gov

October 13, 2023

City of Walla Walla Hearing Examiner
c/o City of Walla Walla Development Services
55 East Monroe Street
Walla Walla WA 99362

Re: City of Walla Walla File # CUP-22-0002; SEP-22-0020
Conditional Use Permit Application ("**Application**") for 928 Sturm Avenue
New Cingular Wireless PCS, LLC ("**Applicant**")

Dear Hearing Examiner:

On behalf of the Applicant, we submit the following rebuttal evidence and closing arguments in support of the Application for the stealth wireless communications facility at 928 Sturm Avenue, Walla Walla ("**Site**").

SUMMARY

The Application should be granted, with the conditions recommended by City staff, because substantial evidence in the record establishes:

1. There is a significant gap in Applicant's coverage in the area around the proposed site.
2. The site must be located at a certain height and in a certain area in order to provide acceptable quality of service in the significant gap, and Applicant conducted a comprehensive search for alternate locations in this dense residential zone.
3. Applicant's application meets all design and location requirements of the Walla Walla Municipal Code ("**WWMC**") for a wireless communications facility in a residential zone on a non-residential use property.
4. The proposed site is compatible with the surrounding area, and is the least intrusive means to provide service in the desired coverage area.
5. Under the federal Telecommunications Act of 1996, the Site is the least intrusive means for AT&T to provide acceptable quality of service within the significant gap in

SEATTLE

LOS ANGELES

ATLANTA

DENVER

PORTLAND

BEND

October 13, 2023

Page 2

coverage, and the City would be materially inhibiting AT&T's ability to provide broadband communications services if the Application is denied.

DISCUSSION

1. Significant gap in coverage.

In 2022, the City amended its land use code to allow for the first time the installation of wireless communications facilities in the Neighborhood Residential zone, on property where there is an existing non-residential use. (WWMC Ord. 2022-26, Section 5; codified at WWMC 20.170.050.) Because the City's prior code precluded the installation of wireless communications facilities in residential zones, there is a dearth of wireless communications facilities in the area around the Site (**Exhibit 9**) and Applicant's wireless communications network has a significant gap in coverage in the area around the Site (**Exhibit 1, Page 189, Figure C**).

Applicant proposes to construct a 65' tall monopine at the Site, with the antenna tip height at 59'. The additional six feet in height will accommodate a camouflage tree topper to provide a more natural shape to the top of the monopine. The Site will provide high quality wireless communications services, both outdoors and indoors, to first responders, residents, students and visitors in the Walla Walla community. (**Exhibit 1, Page 187**).

Applicant provides this coverage information in response to the WWMC's application requirements (WWMC Section 20.170.032) and to address relevant issues under federal communications law.

RF Engineering Maps versus Web Site Maps

In the comment letter submitted by Zachary Griefen on September 29, 2023, he includes the following statement on Page 2, with links to Applicant's Online Commercial Service map as well as links to the FCC Broadband Funding Map. Mr. Griefen's letter includes several potentially misleading statements that Applicant would like to address:

This proposed cell tower would be located at 928 Strum [sic] 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. FN.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 Applicant's purported coverage gap).

October 13, 2023

Page 3

As the Applicant's and the FCC's websites explain, neither of the mapping tools referenced by Mr. Griefen are intended to illustrate the network coverage and capacity needs of a particular provider at a specific location. The limited purposes of each of these website maps are, in fact, detailed in explanatory disclaimers that Mr. Griefen neglected to include or reference in his letter.

Accordingly, Applicant submits the attached Declaration of Kung-Liang (Brian) Lin, Applicant's radiofrequency engineer, to explain why the mapping tools cited by Mr. Griefen are not useful in planning the network or assessing the in-building coverage and capacity needs.

(Attachment 1.) Mr. Lin also addresses why so called "hard data" like drive tests are not useful in assessing in-building coverage and capacity needs in a rapidly expanding network. The full text of the explanatory disclaimers and the online maps are included as exhibits to his declaration under penalty of perjury.

Mr. Griefen also refers to the City's comprehensive plan which asserts that there are no gaps in telecommunications services in the City. The quote from the comprehensive plan above does not distinguish between gaps in landline telecommunications services versus wireless telecommunications services, so the general reference to communications services is irrelevant to the quality of the Applicant's services in the City.

Mr. Griefen's comments about existing coverage or the improvements in wireless broadband services that will be made available to the Walla Walla community from the proposed Site should be disregarded.

2. Comprehensive search for alternate locations.

Opponents argued that Applicant failed to conduct a comprehensive search for alternative sites. They raise two separate issues: (1) whether Applicant's outreach to 11 property owners constitutes a comprehensive search for alternative sites; and (2) whether Applicant's records of its outreach efforts to the 11 property owners meets the WWMC approval criteria for wireless conditional use permits.

Comprehensive Search

When evaluating whether a comprehensive search was made for alternative site locations, three fundamental realities must be applied:

1. Technical Performance. The technical performance and limitations of the wireless communications network has a direct impact on whether the proposed site may be located on a particular property.

2. Zoning. The zoning classification of the alternative sites has a direct impact on whether the proposed site may be located on a particular property.

3. Land Use Code. The WWMC approval criteria for wireless communications facilities has a direct impact on whether the proposed site may be located on a particular property.

First, the technical performance and limitations of the wireless communications network require Applicant to locate the proposed site within the geographic area that is to be served by the site. (**Exhibit 1, Page 185.**) Applicant cannot provide service to Sturm Road and the surrounding area from a wireless communications site that is located in Yakima; likewise, Applicant cannot provide service to Sturm Road from a site that is located in downtown Walla Walla. The site must be located near the center of the area to be served, and the antennas must be approximately 60' above ground level in order to provide acceptable service in the desired coverage area. (**Exhibit 1, Page 187.**)

Second, the Walla Walla zoning classification for the area to be served by the Site is substantially Neighborhood Residential, with some Public Reserve. (*See Attachment 2.*) There are no industrial, manufacturing, or commercial properties in the desired coverage area.

Third, the proposed site must be located on property that meets the WWMC approval criteria for wireless communications facilities. The WWMC approval criteria for Neighborhood Residential properties include:

- Existing, non-residential use (including churches)
- Height limit of 65 feet
- Stealth design (including trees)
- New tower site: Setback 1:1 from residential property line
- New rooftop site: Roof is at least 35' tall

When searching for alternative site candidates, Applicant applies all three of these fundamental realities before reaching out to the local community. Applicant does not blindly blanket property owners with inquiries about hosting a wireless communications facility. J5, on behalf of Applicant, applied the three realities when deciding to send letters to the 11 property owners. Three property owners responded to the letters, and J5 followed up with all three property owners and evaluated the feasibility of construction and design options for those properties. Applicant decided to proceed with the proposed Site at the Blue Mountain Community Church because the Church's property had more vacant land and more natural screening available than the other two candidates, making the Site the least intrusive option to provide service in the area.

By sending these 11 letters and communicating with all three property owners who responded, Applicant made a comprehensive effort to identify alternative locations because very simply, in

October 13, 2023

Page 5

the middle of this Neighborhood Residential zone there are very few alternative locations within the desired coverage area that qualify for consideration under the three realities.

Opponents argue that Applicant should have reached out to a substantial number of additional property owners, attaching a list of 31 alternative sites to Mr. Griefen's letter dated September 21, 2023. Of the 31 properties listed, only 2 are located within the desired coverage area and Applicant had already sent a letter to the property owner for both of them (Walla Walla School District #140). The school district did not respond to Applicant's inquiry. The vast majority of the 31 addresses (94%) are outside of the desired coverage area and are not feasible alternatives. (Compare map of Mr. Griefen's addresses in **Attachment 3** with coverage map at **Exhibit 1, Page 188.**)

Two of the opponents' addresses are just outside of the desired coverage area, to the west. Both are single story churches with steeples (*See Attachments 4 and 5* attached hereto), and neither are suitable to co-locate a wireless communications facility with a 59-foot antenna tip height.

Several commenters mentioned a tower at Leonetti Cellar. The wireless communications facility at Leonetti Cellar is a flagpole that is approximately 40' tall, and it is located literally across the street from the property where DISH has a permit to construct a 100' tall tower. Applicant already submitted into the record an RF engineer's analysis that rejected the DISH tower as a potential co-location site because the coverage provided from the DISH tower at 85 feet above ground level was unacceptable to Applicant. (*See Exhibit 1, Pages 191 and 192.*) The flagpole at Leonetti Cellar is much shorter than the to-be-constructed DISH tower across the street, so the coverage from the Leonetti Cellar flagpole is even more unsuitable to the Applicant. (*See Attachment 1.*) Finally, the DISH tower is not yet constructed, so the DISH tower is not an *existing* antenna support structure and is therefore not a co-location opportunity to be evaluated under the WWMC. (*See WWMC Section 20.170.070(A)(1).*)

Finally, the letter from Mr. Griefen dated September 21, 2023 lists the Pioneer Middle School as a potential co-location opportunity that Applicant should have pursued. (*See Exhibit 12, page 11.*) As mentioned above, Applicant sent a letter to Walla Walla School District #144 and did not receive a response. Even if the school district expressed an interest in leasing space for a wireless communications facility, Applicant's installation would be limited to attaching to existing structures or buildings at the school. (WWMC Section 20.170.040(C)(5).) It is not possible to attach antennas to the existing buildings at the Pioneer Middle School at a height of 59 feet above ground level. (*See Attachment 6* showing 2- and 3- story buildings at the school.)

There is no evidence in the record of any alternative site that could accommodate a wireless communications facility in a less-intrusive means than the proposed Site.

In summary, the proposed Site is located in an extensive Neighborhood Residential zone which has very few existing non-residential uses, so the number of potential alternative sites is very

October 13, 2023

Page 6

limited. Applicant has conducted as much of a search as is possible given the very limited number of alternative sites in the desired coverage area.

Documentation of the Comprehensive Search

Commentors asserted that the Applicant had not conducted a comprehensive search for alternative sites because of the City's request for documentation of owner's names, titles, letters, dates and results in the record. However, none of the commentors have cited any sections of the WWMC that require an applicant to file such detailed information with an application, or to any section of the WWMC that requires such information as an approval criteria for a wireless communications facility. There is no such application or approval criteria in the WWMC.

The actual WWMC requirement is for (1) comprehensive efforts, (2) shown by documentation:

Applications shall be required to provide documentation that comprehensive efforts to identify alternative locations were made. WWMC Section 20.170.070(A)(1).

The process followed by J5, Applicant's agent, to identify alternative locations are described in the attached *Declaration of Phillip Kitzes (Attachment 7)*. As discussed above, J5 researched the City's land use code and zoning maps, evaluated the parcel sizes and existing uses, and selected properties that appeared to offer an opportunity to host a wireless communications facility. J5 prepared letters to the property owners using J5's letter template, and mailed the letter to the property owner. J5 did not keep a copy of the letter template or the customized letter, but kept a list showing the property owners names, addresses and dates for the letters. If a property owner responded to the letter, J5 kept notes of the conversations and subsequent meetings.

J5's documentation of the mailing list, addresses, names, the mailing date, the follow up communication dates, and notes of the actual communications were included in the alternative site analysis filed with the Application. (**Exhibit 1, Page 232.**) J5's letter template is included as an attachment to **Attachment 7**. The only item the opponents requested that does not appear in the record is the title of the letter's addressee. The lack of the addressee's title is certainly not grounds to deny the Application. Therefore, Applicant has satisfied the code requirement to provide documentation of the comprehensive search and the Application should be approved. (WWMC Section 20.170.070(A)(1).)

3. Application complies with all design and location requirements.

The Application complies with all of the City's design and location requirements. The Application should not be evaluated as if it is for an 85 foot tall monopine, and any argument to the contrary is based on a misunderstanding of federal law.

October 13, 2023

Page 7

Application complies with WWMC.

The Application complies with all siting and design criteria for a 65 foot tall wireless communications facility located in the Neighborhood Residential zone:

- Siting criteria: No higher preferred location exists in the search area
- Stealth design: Monopine design
- Existing non-residential use: Church
- Height: 65 feet
- Setback: 65 feet from property lines; condition of approval

Based on the Application, the facility complies with all siting and design criteria.

Application is not for an 85 foot tall monopine.

Mr. Griefen argues that, due to a federal communications law (commonly known as "**Section 6409**", codified at 47 USC Section 1455(a)), the Application for a 65 foot tall monopine must be ignored and instead be reviewed as an application for an 85 foot tall monopine whose drip line is 40 feet wide (20 feet wide on each side of the structure; not 20 feet wider than the proposed structure as argued by Mr. Griefen). (Letter dated September 29, 2023, Pages 4-5.) This argument is based on a lack of understanding of federal communications law, and the argument must be rejected.

First, the Application is for a 65 foot tall monopine. There is no evidence in the record that an application is filed or will ever be filed to increase the height by 20 feet, or to increase the width to 40 feet. If an application is ever filed to increase the height by 20 feet or increase the width to 40 feet, the City may approve or deny such application based on the facts in the application at that time. The current Application must be decided based on the facts in the record of this proceeding.

Second, the argument does not cite any Federal Communications Commission ("**FCC**") ruling, order, or regulation, or any federal case law in support for the novel claim that the speculative potential for a height increase would provide grounds for denial--because there is no such authority. This argument has not been accepted by any court or the FCC.

Finally, the argument ignores the FCC's acknowledged exemption from Section 6409 for state and local health and safety regulations and the Applicant's ongoing responsibility to comply with such regulations. If a state or a city has a health or safety regulation, Section 6409 does not preempt the regulation. (*In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, FCC 14-153 (October 21, 2014) Para. 202 and fn. 595.)

October 13, 2023

Page 8

Accordingly, if a future applicant seeks to increase the height by 20 feet or increase the width to 40 feet, the City **at that time** may determine whether a health or safety regulation would preclude approval of the proposed modification under Section 6409. That question is not before the Hearing Examiner today as part of this Application. The opponents' argument on this point is without merit and should be rejected.

4. The site is compatible with the surrounding area.

The Application is for an un-staffed, wireless communications facility, located on a large lot behind a church which has a tall steeple, located within a stand of mature trees which provide total screening on the north, northwest and west sides, designed as a monopine without lights or signs, with vegetation planted around the equipment compound, and constructed with noise-absorbing materials. Post-construction, there will be little traffic to the Site for routine maintenance visits. The facility will operate in compliance with the FCC's regulations.

The City Council, recognizing the need to provide to allow for high quality wireless broadband services throughout the City for medical and public safety emergencies, first responders, students and travelers, found that two types of installations are compatible with the City's residential zones: stealth poles and stealth attachments to existing buildings. The Application is not for a 100+ foot tall monopole or lattice tower with lights. The Application precisely matches the design requirements of WWMC 20.170 Wireless Communications Facilities for stealth antenna support structures and is compatible with the surrounding area.

In addition, the Site is consistent with the other measures of compatibility:

- Noise. The wireless communications facility will comply with the City's noise ordinance.
- Traffic. The Site, as an un-staffed communications facility, will not generate traffic to the area post-construction other than an occasional maintenance visit.
- Odors. The wireless communications facility will include a diesel backup generator that will operate during extended power outages and occasionally for maintenance purposes. The emissions from the generator will be no different than emissions from a diesel vehicle.

Opponents argue the Site is not compatible with the surrounding areas for several reasons, none of which demonstrate the Site is incompatible:

Aesthetics. Opponents argue that the Site is not compatible with the surrounding area because it will "loom" over the neighborhood. (Mr. Griefen September 29, 2023 letter, Page 6.) The reality is that the monopine will be: (1) blocked from views from the north, northwest and west; (2) partially screened from view from the east by the Church building and from the southwest by

October 13, 2023

Page 9

one mature tree; (3) only 15 feet to 20 feet taller than the Church steeple and surrounding mature trees, and (4) designed as a stealth tree as in accordance with the City's design requirements. The simple fact that the monopine is visible from certain areas in the neighborhood does not make it incompatible with the surrounding area. The stealth Site will use colors that are similar to surrounding trees, and the height will be slightly above the Church steeple and surrounding trees.

As noted in Mr. Griefen's September 29 letter, aesthetic factors are legitimate concerns for a locality, and may be considered in the decision of whether to approve or deny applications for WCF permits. *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Ests.*, 583 F.3d 716, 721 (9th Cir. 2009); *T-Mobile USA, Inc. V. City of Anacortes* 572 F.3d 987, 994 (9th Cir. 2009). The aesthetic factors to be applied, however, are identified in the local code and the Application complies with the City's code. The Walla Walla Municipal Code requires applicants to mitigate visual impacts through industry-recognized concealment techniques that include consideration of the surrounding vegetation. WWMC § 20.170.070. The City's code clearly allows for aesthetic concerns to be addressed through concealment and designing the facility with elements of the surrounding foliage as the Applicant proposes here. The Application meets the code's aesthetic standards and is not grounds for denial under either of the cases cited above.

Property values. Many commentors argued that the Application must be denied because of the potential impact on property values, but they provided no citations to the WWMC that require the Applicant to prove whether a wireless communications facility (or any conditional use) has a negative or a positive effect on surrounding property values. Since the WWMC does not require any evaluation of property values, it is inappropriate to create a new, previously-undefined standard for approval that was not adopted by the City Council and apply it to the Application.

In addition, as discussed in our firm's letter to the Hearing Examiner dated September 21, 2023 (**Exhibit 7**) it is unlawful to consider any arguments which are based on the potential health impacts of the proposed Site.

The commentors arguments about aesthetics, property values, noise and other factors do not prove that the Site is not compatible with the surrounding area, and the Application should be approved.

Additional matters raised by opponents

Opponents provided a significant number of additional comments and concerns, which will be addressed below.

Staff recommendation. Mr. Griefen notes City staff did not recommend approval of the application, but he did not cite any section of the WWMC that requires staff to make any recommendation for approval or denial to the Hearing Examiner. Also, City staff did not recommend denial of the Application either. Staff simply deferred the decision to the Hearing

October 13, 2023

Page 10

Examiner while providing recommended conditions of approval, all of which are acceptable to the Applicant.

Noise complaints. One commenter at the September 21, 2023 public hearing questioned how to submit a complaint about noise levels from the wireless communications facility. If anyone believes the noise level exceeds what is allowed by City code, they may either contact the Applicant at the phone number posted at the Site, or by calling the City's code enforcement officer.

RF complaints. One commenter at the September 12, 2023 public hearing questioned how to submit a complaint about radio frequency emissions that exceed the FCC's regulations. Reports of radio frequencies exceeding the FCC's regulations may be reported to the Applicant at the phone number posted at the Site, or by calling the Federal Communications Commission's regional or national offices.

Watershed. Mr. Griefen expressed concern about potential fluid leaks and the local aquifer. The generator and backup batteries will be installed and maintained in accordance with applicable laws and regulations, which will be addressed during the building permit phase.

Power line. Mr. Griefen expressed safety concerns regarding aerial electrical service lines that are located near the location for the proposed Site. The monopine will be installed in compliance with all setback requirements from electric utility facilities, to be addressed during the building permit phase. Electric utility lines may be relocated as required, with the assistance of the local electric utility company.

Safety. Mr. Griefen expressed safety concerns regarding ice storms and the child care center's playground at the Church. Child care center operators are required by Washington state regulations to take appropriate precautions when weather conditions may pose a safety hazard to preschool children (WAC 110-300-0147). If weather conditions create a hazard, the child care center operator will take appropriate steps to protect the safety of the students. The mere possibility of an ice storm and falling ice is insufficient to deny the Application.

Adequacy of photosims. Mr. Griefen's September 29, 2023 letter mischaracterizes the narrow holding in *Omnipoint Commc'ns, Inc. v. City of White Plains*, 430 F.3d 529 (2d Cir. 2005), which is limited to the specific facts of that case. In *Omnipoint*, a visual impact study was conducted by parking a 150-foot crane at the proposed site and taking pictures of the crane from public streets. The applicant used this information to assert "*except for a single property*, the crane would be invisible or unnoticeable outside the golf course" (emphasis added). *Id.* at 532.

The court in *Omnipoint* found the applicant's visibility study was flawed because the study's conclusion (that the tower would be invisible except from one private property) was not supported by the study's methodology that did not take photos from private properties. The court

held that the photos did not support the applicant's conclusion that the proposed tower to be “invisible or unnoticeable” from other nearby residences.

For this Site, the Applicant is not claiming the tower will be invisible or unnoticeable from all but one residence, so the *Omnipoint* case is irrelevant. Mr. Greifen’s letter misconstrues the fact-specific holding in *Omnipoint* when he claims that a visual impact study is misleading if no views depicted are from neighboring residences. In actuality, the court’s holding was Omnipoint's specific visual impact study’s conclusion was not supported by photos from the public right of way, and thus the decisionmaker in *Omnipoint* acted appropriately in discounting the study's findings. For the Applicant's Site, the photos and photosims accurately reflect the proposed appearance of the Site.

5. Federal Telecommunications Act of 1996

Congress enacted the Telecommunications Act of 1996 (“**Act**”), Pub. LA. No. 104- 104,110 Stat. 56 (1996), “to promote competition and . . . encourage the rapid deployment of new telecommunications technologies.” *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 576 (9th Cir. 2008) (quoting 110 Stat. at 56). The Act seeks to reduce “impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers” (*City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005)), and restricts the authority of state and local governments to regulate “placement, construction, and modification of personal wireless service facilities” 47 U.S.C. § 332(c)(7)(B).

The Act provides rights to wireless service providers and establishes limitations upon state and local zoning authorities with respect to applications for permits to construct wireless communications facilities. Specifically, the Act prohibits a local government from denying an application for a wireless telecommunications facility when doing so would “prohibit or have the effect of prohibiting the provision of personal wireless services.” 47 U.S.C. § 332(c)(7)(B)(i)(II).

An effective prohibition occurs whenever the decision of a local government materially inhibits wireless services. *In the Matter of Cal. Payphone Assoc. Pet. for Preemption, Etc.*, 12 FCC Rcd. 14191 (FCC rel. July 17, 1997); *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (noting Ninth Circuit’s analysis of effective prohibition “is consistent with the FCC’s” standard under California Payphone). The FCC has more recently reiterated the validity of its material inhibition standard, which the Ninth Circuit reaffirmed and upheld. *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv., Etc.*, 33 FCC Rcd. 9088 (FCC rel. Sept. 27, 2018) (“*Infrastructure Order*”) (material inhibition occurs whenever a denial prevents a wireless provider from providing new services or improving existing services); *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), cert. denied, *City of Portland v. FCC*, 141 S.Ct. 2855 (2021). This “effective prohibition analysis focuses on the service the provider wishes to provide, incorporating the capabilities and performance characteristics it wishes to employ, including facilities deployment to provide

October 13, 2023

Page 12

existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless service for the benefit of the public.” *Infrastructure Order*, n.95.

A wireless carrier may also demonstrate an effective prohibition by showing that a permitting entity has denied an application for a wireless facility despite (1) evidence of a “significant gap” in the carrier’s service and (2) a showing by the carrier that the proposed installation is the “least intrusive means” for closing that gap. *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 734-35 (9th Cir. 2005), abrogated on other grounds in *T-Mobile S., LLC v. City of Roswell, Ga.*, 574 U.S. 293 (2015) (adopting least intrusive means test because “it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials”); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995 (9th Cir. 2009) (quotation marks and citation omitted). Under this judicial test, once a wireless provider presents prima facie evidence of a significant gap and that its proposal is the least intrusive means for closing that gap, the burden shifts to the local government to prove that an available, feasible, and less intrusive alternative exists. *Id.* at 998-99. To meet this shifted burden, the opponents and/or the local government must show that another alternative is (a) available, (b) technologically feasible, and (c) less intrusive than the carrier’s proposed gap solution. *Id.* The applicant then has the opportunity to rebut the availability and feasibility of any alternatives identified by the local government. *Id.*

Here, the Applicant has a significant gap in coverage in the vicinity of the Site and has demonstrated it needs to provide more robust wireless services by improving its existing wireless network in the desired service area. There is no evidence in the record for any an alternative location in the desired coverage area that is: (a) available for leasing to the Applicant, (b) technologically feasible to provide service in the significant gap in coverage, and (c) less intrusive than the Applicant's proposed Site.

For these reasons, the Applicant respectfully requests the Hearing Examiner to approve the Application with the conditions of approval recommended by City staff.

Very truly yours,



Richard J. Busch
Attorney for Applicant
New Cingular Wireless PCS, LLC

Attachment 1

Declaration of Kung-Liang (Brian) Lin



Declaration of Kung-Liang (Brian) Lin

- I am employed as a radio frequency engineer for AT&T. My experience includes cellular coverage predictions and site design.
- I have reviewed the AT&T Commercial Service Online Coverage Map and the FCC Broadband Map, attached as Attachment 1 and Attachment 2. The AT&T online coverage map for this proposed Walla Walla, WA site contains a link to a disclaimer that outlines the limited parameters of this map.
- To address the assertions made by opponents to this application regarding the wireless coverage shown in the two online coverage maps, I provide the following:
- Generally, online coverage maps are far less sophisticated than the propagation maps I rely on to design AT&T's network and that form the basis for my analysis in the RF Justification in the record (Exhibit 1: Staff Report, p. 183).

For example:

- AT&T's commercial online coverage maps clearly state that they show "approximate outdoor coverage" and are a "predicted high-level approximation of wireless coverage." See attached disclaimer.
- In contrast, AT&T's coverage objective with the proposed site is to provide reliable outdoor, in-vehicle and in-building 4G LTE coverage in a rapidly expanding and dynamic wireless network. See Exhibit 1: Staff Report, p. 184, RF Justification, Service Objectives. Such proposed service is of a higher quality than that represented in the online coverage maps and is measured at a different, higher and more finely detailed threshold using predictive propagation mapping software. This software includes multiple inputs and variable data points that cannot be captured by using only data like drive testing.
- Use of tools like drive test data is of limited utility in assessing the indoor coverage gap as it only records coverage at the street at a single point in time. It is also of limited utility in assessing the need for additional network capacity due to too many users or large amounts of data traffic because the drive test captures only the moment in time that the test car drives by the point of measurement. The network availability and quality at other times, when more users may be creating congestion, is not captured by a drive test. AT&T's coverage prediction software is capable of producing 10-meter-resolution cellular coverage maps. Along with penetration loss per clutter in the area, AT&T's software is also capable of producing indoor coverage maps. This provides detailed reference scenarios for how future coverage is affected by deployment of a




Kung-Liang (Brian) Lin
RF Engineer

new site in AT&T's network.

- With respect to the FCC Broadband Map, the attached disclaimer clearly states that the map does include indoor coverage data, which is a primary objective of the proposed site in Walla Walla. As my RF Justification states, this site is proposed to provide reliable outdoor, in-vehicle and in-building 4G LTE coverage, which require much more sophisticated mapping tools.
- My RF Justification in the record includes an analysis of the 100-foot tall tower proposed by DISH Wireless. Exhibit 1: Staff Report, p. 191. The design of the tower would allow AT&T to achieve an antenna tip height of 85 feet. My analysis concluded that such an 85-foot antenna tip height would not provide acceptable AT&T network coverage in the surrounding areas.
- I understand that Mr. Griefen's September 21 and September 29 letters have cited the existence of a wireless tower located at Leonetti Cellar at 1278 Berney Drive. I attach a picture of the tower as Attachment 3. The tower is approximately 30 feet tall. This would place AT&T's antennas at tip height of approximately 20 feet. This tip height would provide limited improvement to service in AT&T's targeted service area, and would be unacceptable to AT&T.

I declare under penalty of perjury that the foregoing is true and correct.

Kung-Liang (Brian) Lin

DocuSigned by:

26DBFABBEDCA4F9...

Name

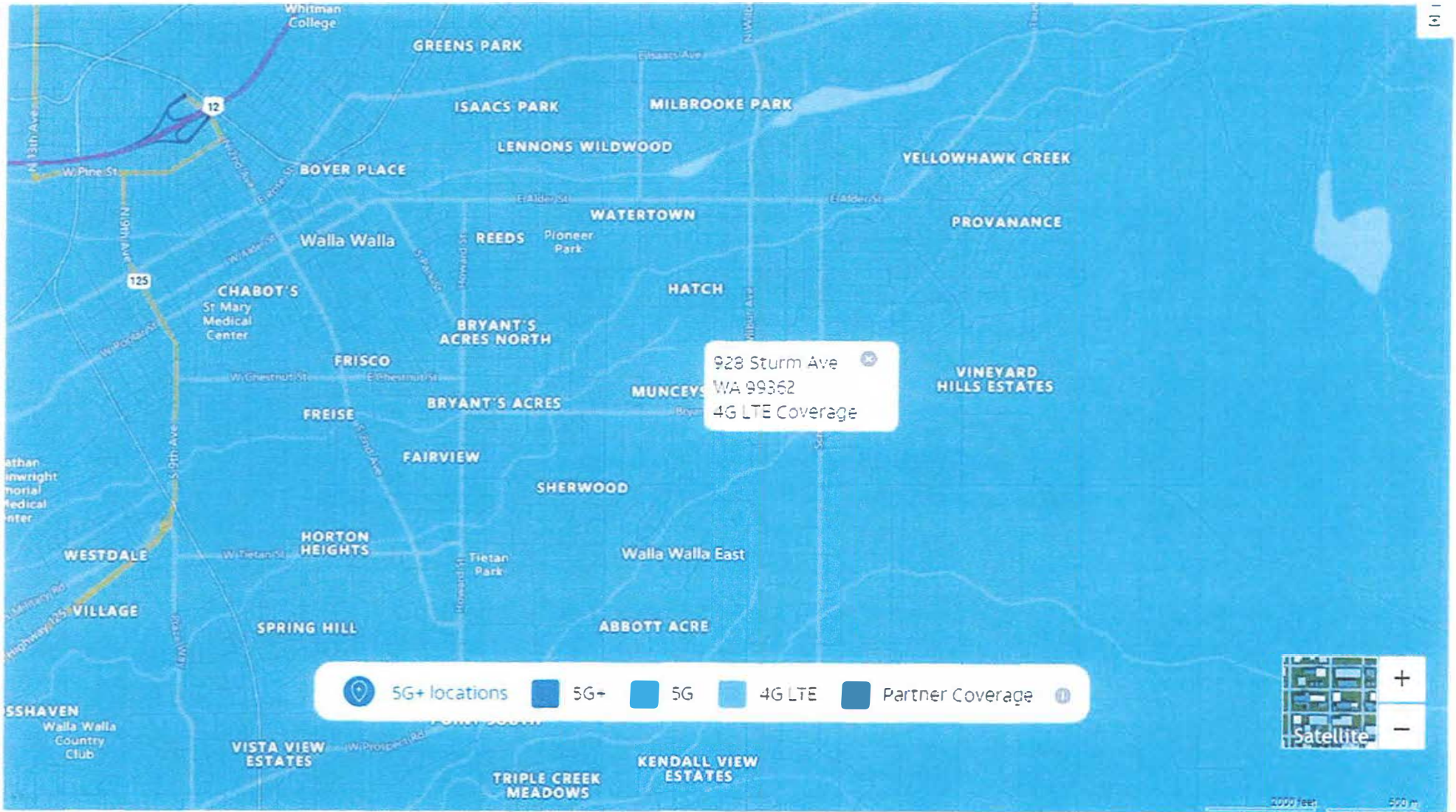
Date: 10/13/2023

Attachments:

Attachment 1: AT&T Online Commercial Service Coverage Map and Disclaimer

Attachment 2: FCC Broadband Map and Disclaimer

Attachment 3: Photograph of Leonetti Cellar Tower



Careers

E AT&T Email with 1TB storage

Coverage maps

Accessibility

Legal policy center

Privacy center

FCC public files

Important information about this coverage map

These maps provide a predicted high-level approximation of wireless coverage. There are gaps in coverage that are not shown by this high-level approximation. Actual coverage may differ from map graphics and may be affected by terrain, weather, network changes, foliage, buildings, construction, signal strength, high-usage periods, customer equipment, and other factors. AT&T does not guarantee coverage. Our coverage maps are not intended to show actual customer performance on the network or future network needs or build requirements inside or outside of existing AT&T coverage areas. Coverage maps may include areas served by unaffiliated carriers. Arrangements with these carriers may change from time to time, and coverage is subject to change without notice. Charges will be based on the location of the site receiving and transmitting the call, not the subscriber's location. Your phone's display does not indicate the rate you will be charged.

These maps are subject to the Microsoft® Service Agreement and for informational purposes only. No guarantee is made regarding their completeness or accuracy. Construction projects, traffic, or other events may cause actual conditions to differ from these results. Map and traffic data 2013 NAVTEQ®

Microsoft Bing Maps Terms of Use

Terms of Use URL:

<http://www.microsoft.com/maps/assets/docs/terms.aspx#1>

Coverage © 2022 Ookla LLC. All rights reserved.

AT&T, AT&T logo, and all other marks contained herein are trademarks of AT&T Intellectual Property and/or AT&T affiliated companies.



Important information about this coverage map

These maps provide a predicted high-level approximation of wireless coverage. There are gaps in coverage that are not shown by this high-level approximation. Actual coverage may differ from map graphics and may be affected by terrain, weather, network changes, foliage, buildings, construction, signal strength, high-usage periods, customer equipment, and other factors. AT&T does not guarantee coverage. Our coverage maps are not intended to show actual customer performance on the network or future network needs or build requirements inside or outside of existing AT&T coverage areas. Coverage maps may include areas served by unaffiliated carriers. Arrangements with these carriers may change from time to time, and coverage is subject to change without notice. Charges will be based on the location of the site receiving and transmitting the call, not the subscriber's location. Your phone's display does not indicate the rate you will be charged.

These maps are subject to the Microsoft® Service Agreement and for informational purposes only. No guarantee is made regarding their completeness or accuracy. Construction projects, traffic, or other events may cause actual conditions to differ from these results. Map and traffic data 2013 NAVTEQ®

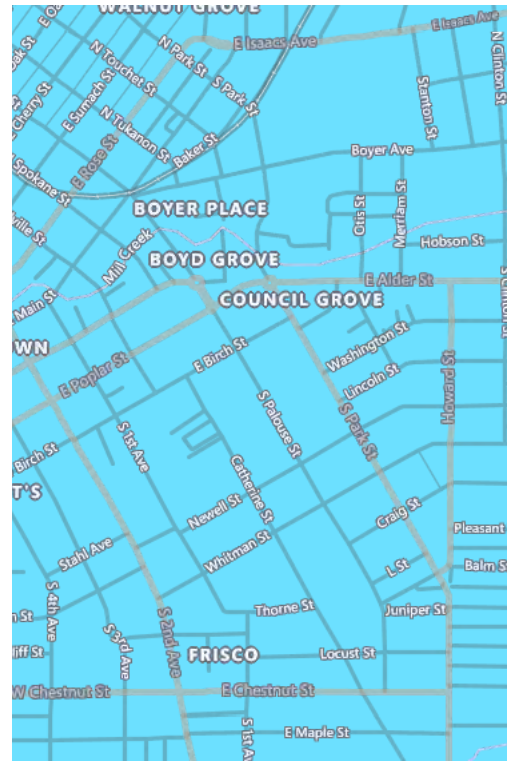
Microsoft Bing Maps Terms of Use

Terms of Use URL:

<http://www.microsoft.com/maps/assets/docs/terms.aspx#1>

Coverage © 2022 Ookla LLC. All rights reserved.

AT&T, AT&T logo, and all other marks contained herein are trademarks of AT&T Intellectual Property and/or AT&T affiliated companies.



ner Coverage ⓘ



ed and is subject to change without notice.

[Learn more.](#)

Liberty Mobile customers go to libertypr.com/es/5g for coverage map and details.

Find a store

Make a store appointment

Contact us

Help & info

Credit card



Currently.com

928 Sturm Street, Walla Walla, Washington 99362, United States

Fixed Broadband Mobile Broadband

Selected Location

928 Sturm Street, Walla Walla, Washington 99362, United States

Broadband

Environment Outdoor Stationary
Technology 4G (5/1 Mbps)
Data As Of Dec 31, 2022 (Last Updated: 10/10/23)

Outdoor Stationary | In Vehicle Mobile

Mobile Challenge

Table with 4 columns: Provider, 3G, 4G LTE, 5G-NR. Rows include AT&T Inc., Inland Cellular Telephone Company, T-Mobile USA, Inc., and Verizon Communications Inc.

Map Legend

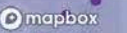
Percentage of Area Served

- 0 - 20%
20 - 40%
40 - 60%
60 - 80%
80 - 100%

Address Location



Zoom Level: 15.99



Provider Detail

This map depicts information on both fixed and mobile broadband availability by service provider. Data on fixed service may be accessed by clicking on the "Fixed Broadband" tab on the upper right side of the page. Data on mobile service may be accessed by clicking on the "Mobile Broadband" tab. To access these data:

1) Choose Fixed or Mobile

- The **Fixed Broadband Map** shows the Internet access services available at each home or small business building using broadband technologies like fiber, cable, DSL, satellite, and fixed wireless. Each building is a point on the map.
- The **Mobile Broadband Map** shows the 3G, 4G LTE, and 5G coverage areas of each mobile provider for both outdoor stationary coverage and in-vehicle mobile coverage. **Note that providers are not required to submit their indoor coverage.** For 5G service, coverage data includes two speed tiers: (i) 35/3 Mbps and (ii) 7/1 Mbps.

2) Add a Provider

Add one or more providers whose data you want to view by clicking "Add Provider" on the right-hand side of the page and typing in the name of a service provider. Names of providers will auto-populate based upon your entry. (Because providers sometimes use a holding company or other corporate name rather than the trade name under which they do business, a list of available providers at a particular location can be obtained by clicking on the location point on the map which will show the name their data is reported as in that area.)

3) Select a Technology

When you select a provider, you must also select a transmission technology (DSL, cable, fiber, fixed wireless, or satellite) for which it reports availability data.

4) View the Map

After clicking on the "Save" button, the map will show the data submitted by the selected provider and technology. If you added more than one provider, each provider's data will be represented on the map with a different color. You can view data for up to three providers at one time.

Remove a Provider. To remove a provider from the map, click the red "x" under "Action." If you want to remove the provider from the map, but continue seeing the percentage of units with coverage, click on the toggle next to the red "x".

Filter. The aggregated data depicted on these maps are based on predetermined filters for technology and other parameters. To filter what's displayed on the maps, click on "Application Settings," represented by a gear icon on the right-hand side of the page.

- On the **Fixed** map, you can filter by data vintage (the "as-of date" for each BDC filing round), residential/business service, speeds offered, and the percent coverage threshold.
- On the **Mobile** map, you can filter by data vintage (the "as-of date" for each BDC filing round), environment (outdoor stationary or in vehicle mobile), and the percent coverage threshold.

The data shown on the National Broadband Map are collected through the FCC's [Broadband Data Collection](#) (BDC). For more information about the BDC, or to request additional assistance, visit www.fcc.gov/BroadbandData/Help

Area Summary

This map depicts information on both fixed and mobile broadband availability, by geographic boundary. Data on fixed service may be accessed by clicking on the "Fixed Broadband" tab on the upper right side of the page. Data on mobile service may be accessed by clicking on the "Mobile Broadband" tab. Data on both fixed and mobile service may be accessed by clicking on the "Combined" tab.

Search by Region/Geographic Boundary. Using the search bar at the top of the page, select from the drop-down menu the type of region or boundary for which you want to view data: state, county, congressional district, census place, Tribal area, or CBSA. Then enter the individual boundary into the search bar. Areas will auto-populate based upon your entry.

For any area that you select, you can view fixed, mobile, or combined data on the map.

- The **Fixed Broadband map** shows the mass-market Internet access services available at each home or small business building using fixed broadband technologies like fiber, cable, DSL, satellite, and fixed wireless. When you zoom in, you will see location points, each of which represents a building on the map.
- The **Mobile Broadband map** shows the 3G, 4G LTE, and 5G coverage areas of each mobile provider in the area of the location for both outdoor stationary coverage and in-vehicle mobile coverage. **Note that providers are not required to submit their indoor coverage.** For 5G service, coverage data is available for two speed tiers: (i) 35/3 Mbps and (ii) 7/1 Mbps.
- The **Combined map** shows where broadband service is available from either a fixed or mobile connection. On the combined map, each service is represented by a different color: purple for fixed, green for mobile, and blue for both fixed and mobile.

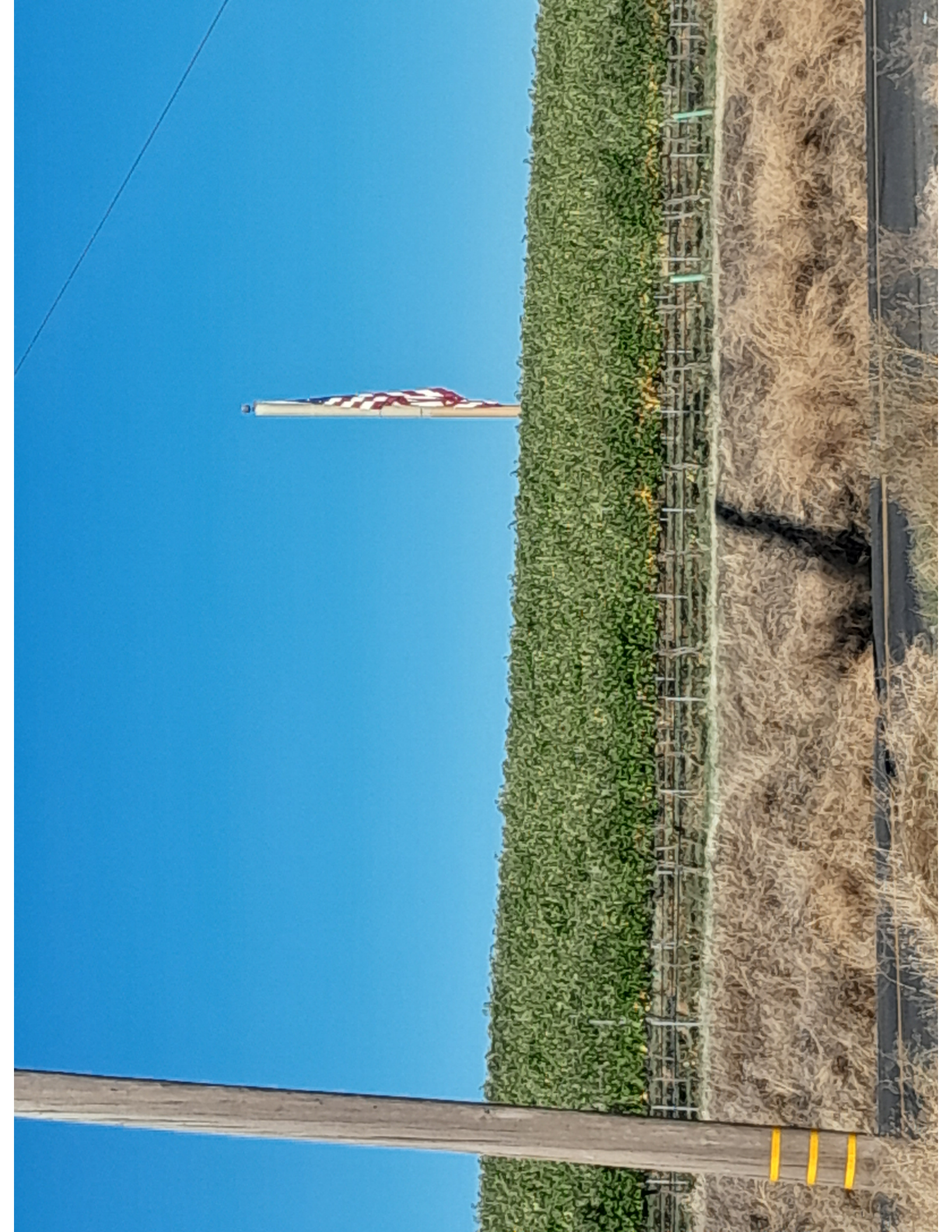
Filter. The aggregated data depicted on these maps are based on predetermined filters for technology and other parameters. To filter what's displayed on the maps, click on "Application Settings," represented by a gear icon on the right-hand side of the page.

- On the **Fixed** map, you can choose from a list of technologies (DSL, cable, fiber, fixed wireless, and satellite) and a list of download/upload speed combinations. You can also

filter by data vintage (the "as-of date" for each bi-annual BDC filing round) and business/residential service.

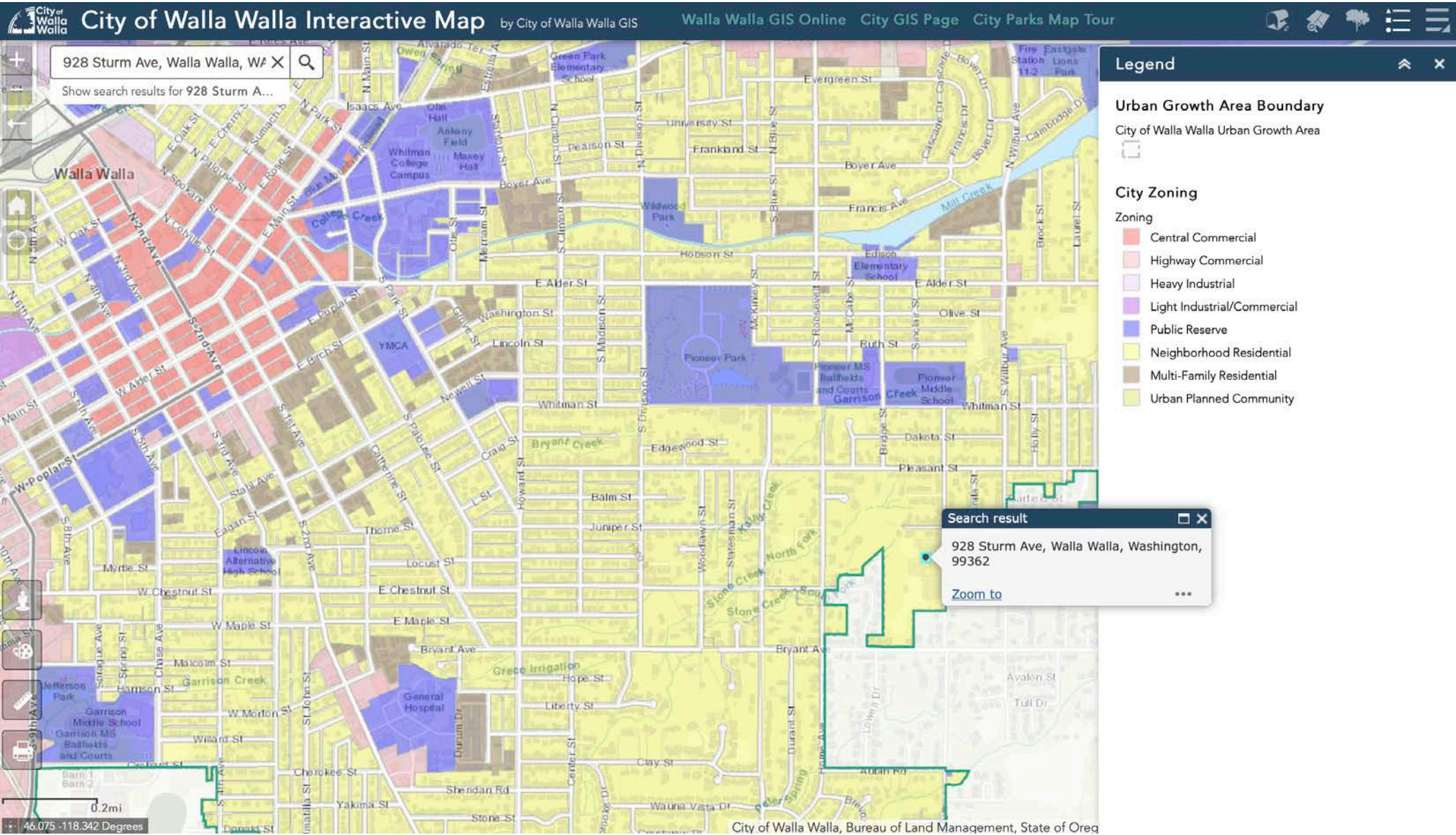
- On the **Mobile** map, you can choose from a list of technologies (3G, 4G, and 5G). You can also filter by data vintage (the "as-of date" for each BDC filing round) and environment (outdoor stationary or in vehicle mobile).
- On the **Combined** map, you can choose from any of the fixed or mobile broadband filters, as well as the percentage coverage threshold (shades hexagons where the percentage of locations on the fixed map, or the coverage area percentage on the mobile map, exceeds the selected values).

The data shown on the National Broadband Map are collected from broadband service providers through the FCC's [Broadband Data Collection](#) (BDC). For more information about the BDC, or to request additional assistance, visit www.fcc.gov/BroadbandData/Help.



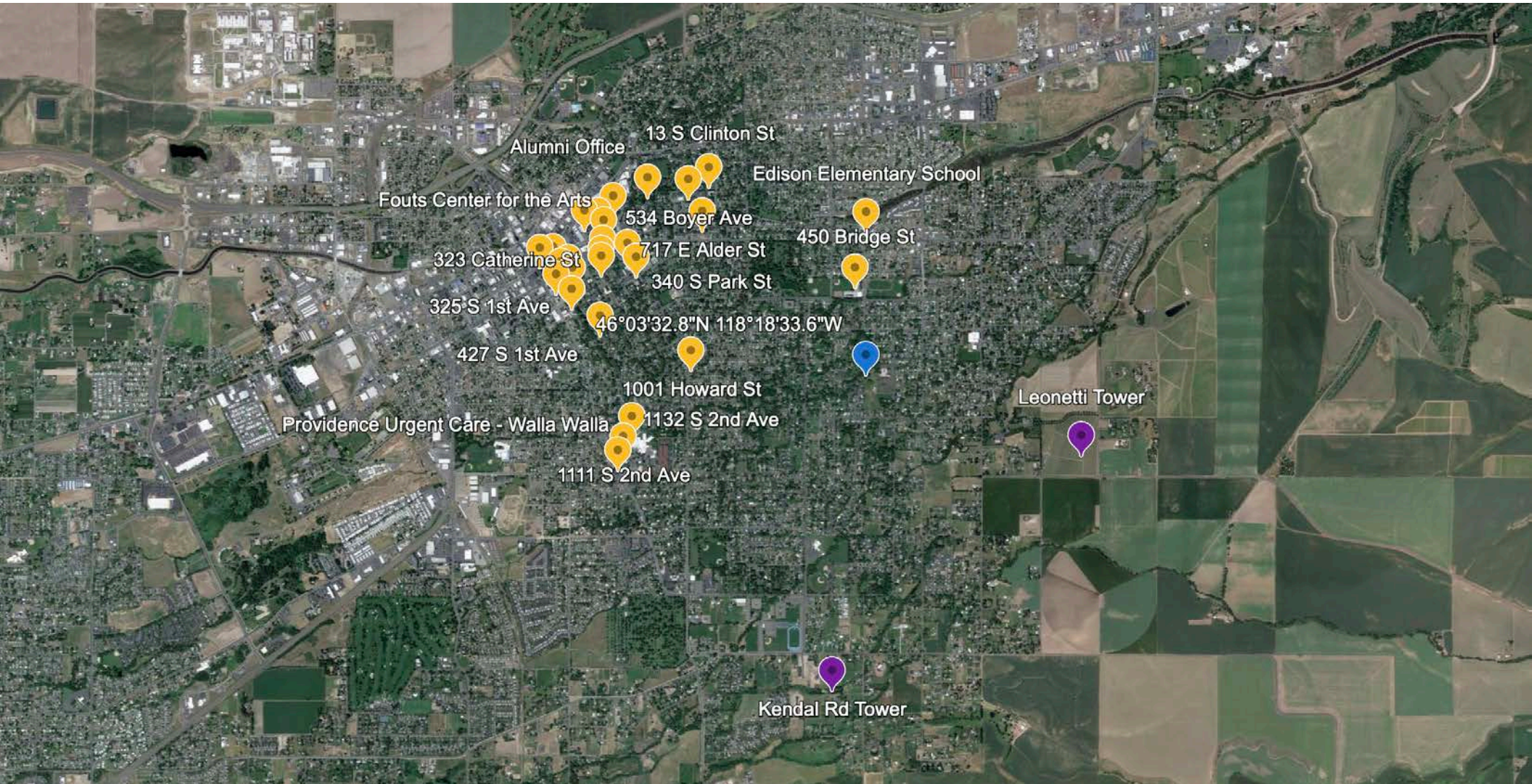
Attachment 2

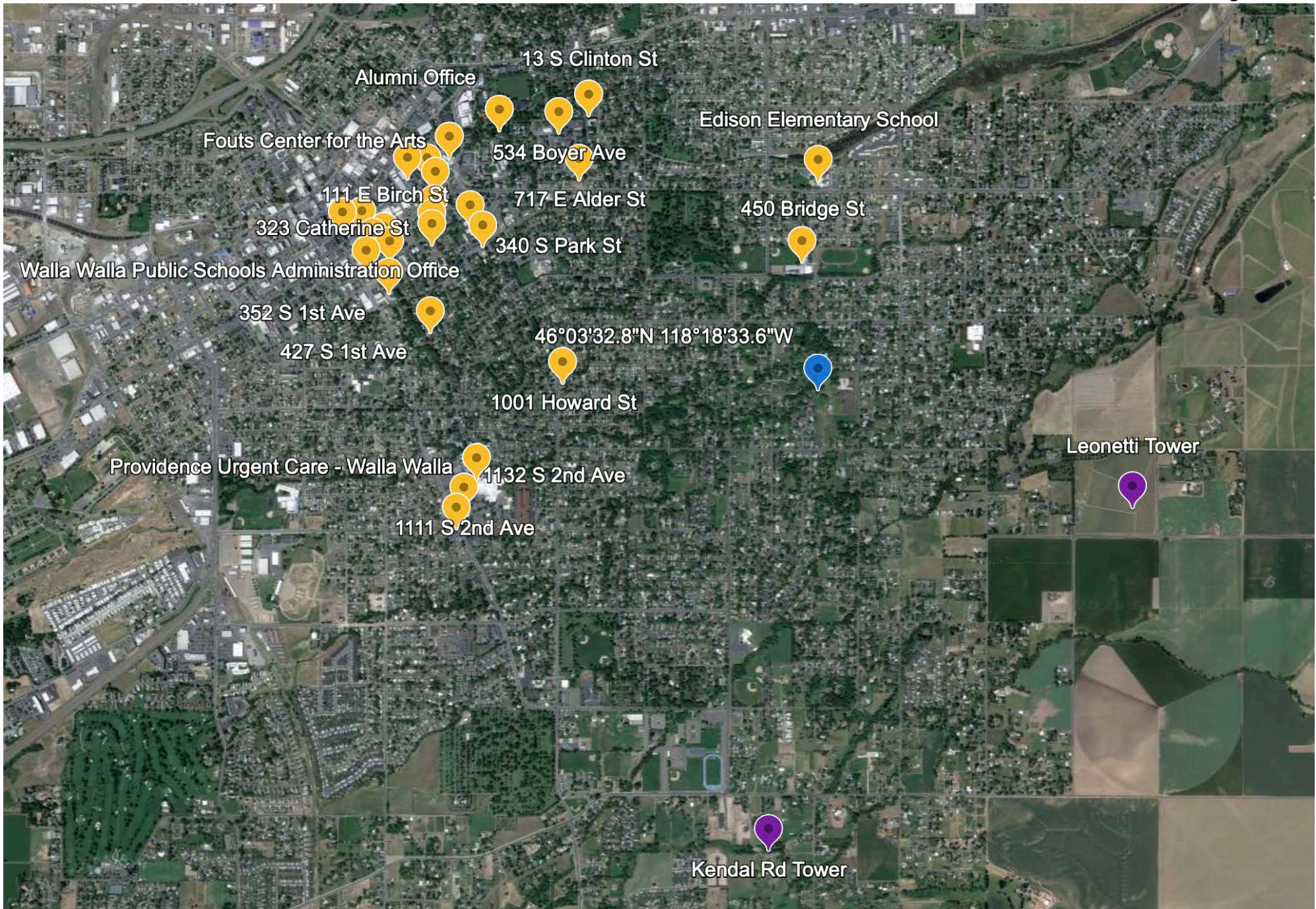
Walla Walla Zoning Map

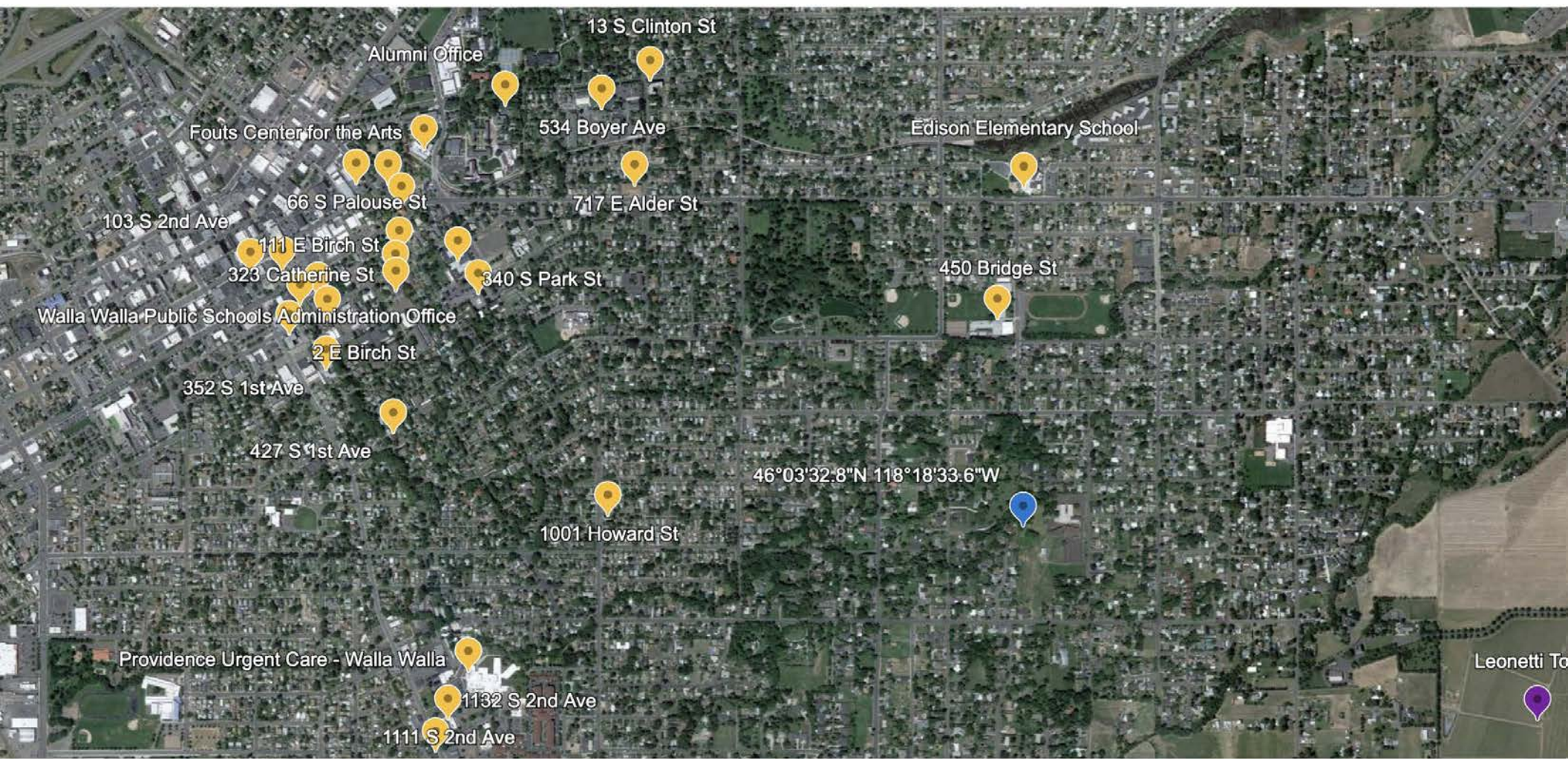


Attachment 3

Map Mr. Griefen's Addresses



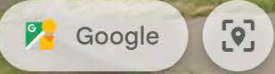




Attachment 4

1001 Howard Str
Street View

← 1000 S Howard St
Walla Walla, Washington



10/13/2023

Community Church of Christ - 1001 Howard St
Zoned - Neighborhood Residential

Attachment 5

717 E Alder St
Street View



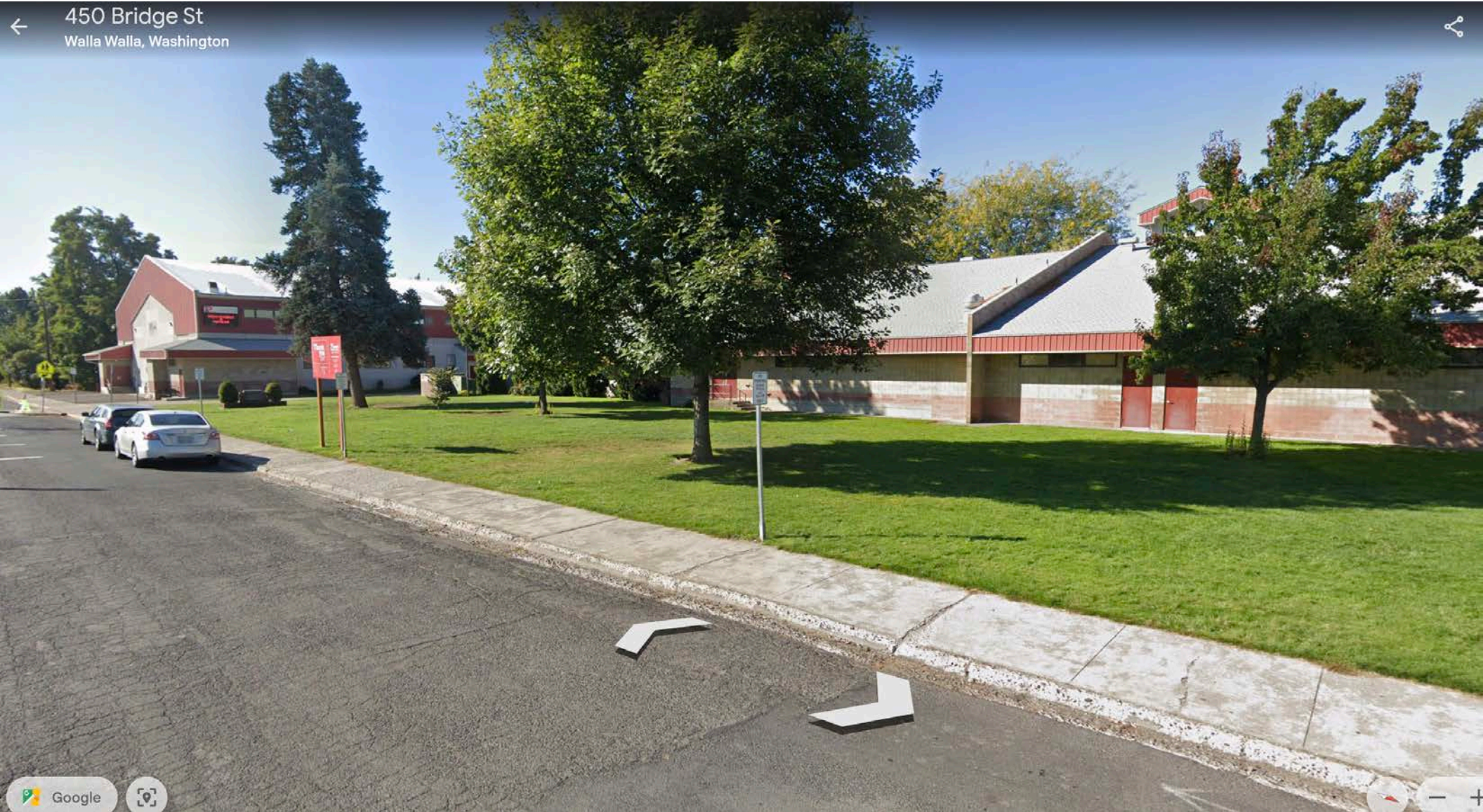
10/13/2023

717 E Alder St
Zoned - Neighborhood Residential

Attachment 6

Pioneer Middle School
Street View

ATTACHMENT # 6
PIONEER MIDDLE SCHOOL



10/13/2023

Attachment 7

Declaration of Phillip Kitzes



Phillip Kitzes
Project Manager I

Declaration of Phillip Kitzes

- I am employed as a Project Manager for J5 Infrastructure Partners. My experience includes wireless site evaluation, searching for interested property owners, and applying for land use entitlements related to wireless communication facilities.
- As part of J5 Infrastructure Partners' search for suitable sites, J5 Infrastructure Partners sends letters to local property owners that are substantially similar to the attached template Letter of Interest.
- I have reviewed J5 Infrastructure Partners' files and I was unable to locate any copies of the actual letters of interest sent to Walla Walla residents in 2020. It is standard practice for J5 Infrastructure Partners to delete letters of interest from our servers once they have been customized for each property owner, printed and mailed.
- I have personal knowledge that J5 Infrastructure Partners mailed letters of interest addressed to the eleven (11) property owners identified in the Alternative Sites Analysis – AT&T WL4557 Walla Walla Mill Creek – 928 Sturm Ave Updated July 2023, which is contained in the record as Exhibit 1: Staff Report, page 232.

I declare under penalty of perjury that the foregoing is true and correct.

Phillip Kitzes

DocuSigned by:
Phillip Kitzes
F2D8D0EA991244D...

Name

Date: 10/13/2023

Attachments:

Attachment 1: Template Letter of Interest



20633 SW Teton Ave
Tualatin, OR 97062

[Month] XX, 20XX

To whom this matter concerns,

I am writing because AT&T is planning to improve service in your area and is looking for landowners who would be interested in possibly leasing a portion of their property to AT&T for such use. The County records list you as the owner of a property located at [Property Address].

AT&T normally seeks to lease an area about 50' wide by 50' deep, with a 20' access easement to the leased area. **Typically, AT&T pays a landowner about \$XXXX per month (\$XXXX per year).** If you have interest in this opportunity, the first step would be to allow an AT&T representative access to your property for photos, testing, and other measurements to determine if your site is a viable candidate.

I have enclosed AT&T's standard Entry and Testing authorization for your review. This authorization form does not obligate you in any way unless you and AT&T mutually wish to proceed with this project. However, it will permit me to meet with you at your property and take a few photos so I can present your property as a candidate to AT&T.

If you are agreeable, please have the attached Entry and Testing authorization form signed and returned to me via a scanned PDF copy to my e-mail address shown below.

J5 Infrastructure Partners is an authorized resource to AT&T for site acquisition and design services. I can be reached by e-mail at [j5 e-mail] or you can call me at [j5 phone #] to discuss specifics concerning your property and our leasing process.

Best Regards,

[Signature]

On behalf of AT&T Mobility

[J5 Contact Name]

J5 Infrastructure Partners

Mobile: (xxx) xxx-xxxx

