



# Whatcom County

COUNTY COURTHOUSE  
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## Agenda Bill Master Report

File Number: AB2022-571

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<b>Agenda Date:</b>	11/09/2022	<b>Enactment #:</b>	ORD 2022-069		

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### TITLE FOR AGENDA ITEM:

Ordinance amending the Whatcom County Code relating to Personal Wireless Service Facilities

### SUMMARY STATEMENT OR LEGAL NOTICE LANGUAGE:

Ordinance amending Whatcom County Code (WCC) 20.13, WCC 20.82, WCC 20.83, WCC 20.97, and WCC 22.05 relating to personal wireless service facilities. The primary purpose of the amendments is to bring consistency between the Whatcom County Code and federal laws and regulations. The proposal addresses eligible facilities requests, small wireless facilities, macro wireless facilities, definitions, exemptions, permitted uses, administrative approval uses, conditional uses, nonconforming uses and structures, concealment elements, standards, noise, conditions associated with siting approval, and project permit procedures (including variances, application requirements, permit review time frames, and appeals).

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### HISTORY OF LEGISLATIVE FILE

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Date:	Acting Body:	Action:	Sent To:
10/25/2022	Council	INTRODUCED FOR PUBLIC HEARING	
		Aye: 7 Buchanan, Byrd, Donovan, Elenbaas, Frazey, Galloway, and Kershner	
		Nay: 0	
		Absent: 0	
11/09/2022	Council	ADOPTED	

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**Agenda Bill Master Report Continued (AB2022-571)**

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Aye: 7 Buchanan, Byrd, Donovan, Elenbaas, Frazey, Galloway, and Kershner  
Nay: 0  
Absent: 0

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**Attachments:** Staff Memo, Draft Ordinance, Planning Commission Findings, Public Comments

PROPOSED BY: Planning & Development Services  
INTRODUCTION DATE: 10/25/22

**ORDINANCE NO.** 2022-069

**AMENDING THE  
WHATCOM COUNTY CODE  
RELATING TO PERSONAL WIRELESS SERVICE FACILITIES**

**WHEREAS,** The Whatcom County Planning Commission held a public hearing and issued recommendations on the proposed amendments; and

**WHEREAS,** The County Council considered Planning Commission recommendations;

**WHEREAS,** The County Council held a public hearing; and

**WHEREAS,** The County Council hereby adopts the following findings of fact:

**FINDINGS OF FACT**

1. The subject proposal consists of amendments to the following Whatcom County Code chapters:
  - a. Wireless Communication Facilities (WCC 20.13);
  - b. Public Utilities (WCC 20.82);
  - c. Nonconforming Uses and Parcels (WCC 20.83);
  - d. Definitions (WCC 20.97); and
  - e. Project Permit Procedures (WCC 22.05).
2. A Determination of Non-Significance was issued by the SEPA Responsible Official on April 6, 2022.
3. Notice of the Planning Commission hearing for the subject amendments was published in the Bellingham Herald on June 13, 2022.
4. Notice of the Planning Commission hearing for the subject amendments was posted on the County website on June 10, 2022.
5. Notice of the Planning Commission hearing was sent to the County's e-mail list on June 13, 2022.
6. The Planning Commission held a public hearing on the subject amendments on June 23, 2022. The Planning Commission held work sessions on the subject amendments on July 28 and September 8, 2022.

7. In order to approve development regulation amendments, the County must find that the amendments are consistent with the comprehensive plan (WCC 22.10.060(2)).
8. Federal laws and regulations partially preempt local government authority over personal wireless service facilities, such as cell phone facilities.
9. Federal law passed by the U.S. Congress indicates that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" (47 U.S. Code 253(a)).
10. Federal law passed by the U.S. Congress (47 U.S. Code 332(c)(7)(B)) states that:
  - (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
    - (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
    - (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
  - (ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.
  - (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
  - (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.
  - (v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited

basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

11. However, Federal law (47 U.S. Code 332(c)(7)(A)) also states:

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

12. Federal law passed by the U.S. Congress (47 U.S. Code 1455 (a)(1)) states that:

. . . 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.

13. Federal law (U.S. Code 1455(a)(2)) defines "eligible facilities request" as:

. . . any request for modification of an existing wireless tower or base station that involves—

- (A) collocation of new transmission equipment;
- (B) removal of transmission equipment; or
- (C) replacement of transmission equipment.

14. The Code of Federal Regulations (CFR) Title 47, Chapter 1, Subchapter A, Part 1, Subpart U titled "State and Local Government Regulation of the Placement, Construction, and Modification of Personal Wireless Facilities" (Rules adopted by FCC) addresses "eligible facilities requests" in Section 1.6100. This section provides definitions and rules for review of applications. CFR 1.6100(c)(2) states that "Within 60 days of the date on which an applicant submits a request seeking approval under this section, the State or local government shall approve the application. . ." for an eligible facilities request.

15. Federal law preempts certain County regulatory authority over wireless eligible facilities requests. The County Code currently does not reflect requirements of federal law. Therefore, County Code is being updated to incorporate the provisions of federal law.

16. The Code of Federal Regulations (CFR) Title 47, Chapter 1, Subchapter A, Part 1, Subpart U titled "State and Local Government Regulation of the Placement, Construction, and Modification of Personal Wireless Facilities" addresses small wireless facilities in Sections 1.6002 and 1.6003. Definitions are set forth in 47 CFR 1.6002. "Presumptively reasonable periods of time" for local government action on applications are contained in 47 CFR 1.6003(c)(1), as follows:
  - . . . Review of an application to collocate a Small Wireless Facility using an existing structure: 60 days.
  - . . . Review of an application to deploy a Small Wireless Facility using a new structure: 90 days. . .
17. Federal law preempts certain County regulatory authority over small wireless facilities. The County Code currently does not reflect requirements of federal law. Therefore, County Code is being updated to incorporate the provisions of federal law.
18. The Code of Federal Regulations Title 47, Chapter 1, Subchapter A, Part 1, Subpart U titled "State and Local Government Regulation of the Placement, Construction, and Modification of Personal Wireless Facilities" addresses facilities that do not qualify as eligible facilities requests or small wireless facilities (that the County is calling "macro wireless facilities") in sections 1.6002 and 1.6003. Definitions are set forth in 47 CFR 1.6002. "Presumptively reasonable periods of time" for local government action on applications are contained in 47 CFR 1.6003(c)(1), as follows:
  - . . . Review of an application to collocate a facility other than a Small Wireless Facility using an existing structure: 90 days. . .
  - Review of an application to deploy a facility other than a Small Wireless Facility using a new structure: 150 days. . .
19. Federal law preempts certain County regulatory authority over macro wireless facilities. The County Code currently does not reflect requirements of federal law. Therefore, County Code is being updated to incorporate the provisions of federal law.
20. Whatcom County Comprehensive Plan Chapter 2 - Land Use states that the County has designated telecommunication towers as essential public facilities (p. 2-95).

21. Whatcom County Comprehensive Plan Land Use Policy 2WW-9 states:  

. . . Personal wireless communication facilities, such as cell phone towers, shall be sited in accordance with Whatcom County Code 20.13 . . . Proximity to airports and potential hazards to aviation will be considered when siting new towers or increasing height of existing towers.
22. The Whatcom County Comprehensive Plan Chapter 5 - Utilities states:  

Utilities, as defined herein and for purposes of the plan, include all lines and facilities used to distribute, collect, transmit, or control electric power, natural gas, petroleum products, information (telecommunications), water, and sewage. . . It is the intent of this plan to support providers of electricity, natural gas, petroleum, telecommunications, and other utilities in fulfilling their public service obligations required by state law to provide service on demand to existing and future customers. It is also the intent of this plan to minimize any negative effects resulting from the provision of that service on the residents, infrastructure, and the environment of the county. . . (p. 5-1).
23. The Whatcom County Comprehensive Plan Utility Chapter states  
"Telecommunications are provided by multiple telephone, cable television, internet, and wireless communication companies. . ." (p. 5-3).
24. Whatcom County Comprehensive Plan policies relating to utilities include:  

Policy 5B-3: Recognize the economic opportunities and benefits communication services access provides to the community.

Policy 5B-4: Support development regulations that are flexible and receptive to innovations and advances in communication technologies and that recognize the positive impact of moving information rather than people.

Policy 5C-1: Support user access to natural gas, electric, and communications utilities.

Goal 5D: Minimize the time required for processing utilities permits.
25. Whatcom County Comprehensive Plan Chapter 7 - Economics states:  

Along with planning for future water and other infrastructure for economic development, electric energy supply and telecommunications are also important for future economic growth within the county (p. 7-11).
26. The Federal Communication Commission's (FCC) *Declaratory Ruling* (November 18, 2009) states ". . . Wireless services are central to the economic, civic, and social lives of over 270 million Americans . . ." (p. 2).

27. The FCC's *Declaratory Ruling and Third Report and Order* (September 26, 2018) states:

. . . America is in the midst of a transition to the next generation of wireless services, known as 5G. These new services can unleash a new wave of entrepreneurship, innovation, and economic opportunity for communities across the country. . . (p. 2).
28. The FCC's *Declaratory Ruling and Notice of Proposed Rulemaking* (June 9, 2020) states:

. . . We are committed to working with State and local governments to facilitate the deployment of advanced wireless networks in all communities consistent with the decisions already made by Congress, which we expect will usher in a new era of American entrepreneurship, productivity, economic opportunity, and innovation for years to come . . . (p. 3).
29. The subject amendments are primarily intended to bring consistency between federal laws adopted by the U.S. Congress & implementing regulations adopted by the FCC and County codes relating to personal wireless service facilities.
30. The federal laws and regulations are intended, among other things, to facilitate user access and economic opportunities. By virtue of being consistent with federal rules, the County Code amendments should also support user access and facilitate economic opportunities and benefits.
31. Federal regulations set "presumptively reasonable periods of time" for local government permitting of various types of wireless facilities. These federal timelines range from 60 days to 150 days depending on the type and size of wireless facility. The subject County Code amendments are consistent with these federal timelines thereby minimizing the required time for processing permits.

## **CONCLUSION**

The subject Whatcom County Code amendments are consistent with the Whatcom County Comprehensive Plan.



NOW, THEREFORE, BE IT ORDAINED by the Whatcom County Council that:

Section 1. Amendments to WCC 20.13 are hereby adopted as shown on Exhibit A.

Section 2. Amendments to WCC 20.82 are hereby adopted as shown on Exhibit B.

Section 3. Amendments to WCC 20.83 are hereby adopted as shown on Exhibit C.

Section 4. Amendments to WCC 20.97 are hereby adopted as shown on Exhibit D.

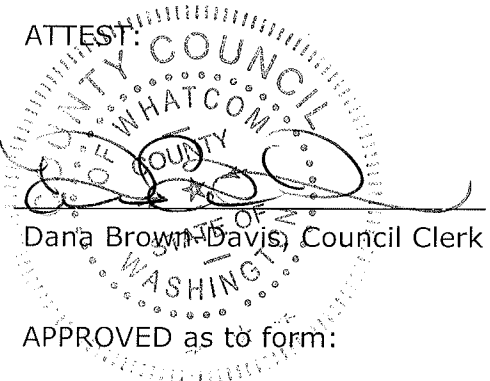
Section 5. Amendments to WCC 22.05 are hereby adopted as shown on Exhibit E.

Section 6. Adjudication of invalidity of any of the sections, clauses, or provisions of this ordinance shall not affect or impair the validity of the ordinance as a whole or any part thereof other than the part so declared to be invalid.

ADOPTED this 9th day of November, 2022.

WHATCOM COUNTY COUNCIL  
WHATCOM COUNTY, WASHINGTON

ATTEST:



Dana Brown-Davis, Council Clerk

A handwritten signature in black ink, appearing to read "Todd Donovan".

Todd Donovan, Chairperson

APPROVED as to form:

Approved ( ) Denied

/s/ Royce Buckingham

Civil Deputy Prosecutor

A handwritten signature in black ink, appearing to read "Satpal Sidhu".

Satpal Sidhu, Executive

Date: November 17, 2022

# EXHIBIT A

Amend WCC 20.13, Wireless Communication Facilities, as shown below.

## Chapter 20.13

### PERSONAL WIRELESS SERVICE COMMUNICATION FACILITIES

Sections:

Rationale: Modify the chapter title for consistency with the terminology used in 47 US Code 332(c)(7) and the Code of Federal Regulations (47 CFR 1.6002(i)).

20.13.010 Purpose.

20.13.020 Definitions - General.

20.13.025 Definitions - Eligible facilities requests.

20.13.030 Applicability – Exemptions.

20.13.040 Permitted uses.

20.13.050 Administrative approval uses.

20.13.060 Conditional uses.

20.13.070 Nonconforming uses and structures.

20.13.080 Prohibited locations for small and macro wireless facilities.

20.13.085 Siting priorities for small and macro wireless facilities.

20.13.090 Design and development standards for small and macro wireless facilities.

~~20.13.092 General design standards.~~

20.13.095 Concealment Elements for small and macro wireless facilities.

20.13.100 Temporary uses.

20.13.105 Noise requirements.

20.13.110 Special exceptions for small and macro wireless facilities.

20.13.120 Conditions associated with siting approval ~~Application requirements and conditions of issuance.~~

20.13.130 General criteria for issuance of permits for small and macro wireless facilities.

20.13.140 Federal requirements.

20.13.150 Removal of antennas and support structures.

20.13.160 Third party review.

20.13.170 Project permit procedures ~~Appeals~~.

**20.13.010 Purpose.**

The purpose of this chapter is to establish regulations for the placement, development, permitting, and removal of personal wireless ~~service communication~~ facilities including support structures and antennas. These standards were developed to comply with the federal laws and regulations relating to personal wireless service facilities (47 US Code Sections 253, 332, and 1455 and 47 CFR Sections 1.6001 through 1.6100)Federal Telecommunications Act of 1996. They are intended to protect property values and minimize visual impact while furthering the development of enhanced telecommunication services in the county.

Rationale: The above amendments provide specific references to the applicable federal laws (US Code) and Code of Federal Regulations (CFR), rather than a reference to a single federal law adopted in 1996.

The term “personal wireless communication facilities” has been changed to “personal wireless service facilities” to match the term defined by the FCC in 47 CFR 1.6002(i).

The provisions of this chapter are not intended to and shall not be interpreted to prohibit or to have the effect of prohibiting personal wireless services. This chapter shall not be applied in such a manner as to discriminate between providers of functionally equivalent personal wireless services.

Whatcom County recognizes its requirement to provide for communication services and a commitment to the health of its citizens.

Rationale: Planning Commission – Recognizes both federal rules relating to wireless, including rules that currently preempt local government regulation of radio frequency emissions, and health concerns expressed by citizens of the County relating to such emissions.

~~In reviewing an application to provide personal wireless service or to install personal wireless service facilities, the county shall act within a reasonable period of time, taking into account the nature and scope of the application and the required notice and necessary review process. Any decision to deny an application shall be in writing, supported by substantial evidence contained in a written record. (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000).~~

Rationale: Permit review time frames for wireless communication facilities are proposed in WCC 22.05.130. The language relating to denials has been moved to proposed WCC 20.13.170.

**20.13.020 Definitions - General.**

As used in this chapter, the following terms shall have the following meanings. Additional definitions that only apply to eligible facilities requests are set forth in WCC 20.13.025. Other words and terms shall have meanings assigned to them by ~~Chapter WCC 20.97-WCC~~ or, if not defined in this chapter or ~~Chapter WCC 20.97-WCC~~, the meaning customarily assigned to them.

(1) "Administrator" means the director of planning and development services or his designee.

(2) "Amateur radio" or "ham radio" means radio facilities operated for noncommercial purposes by individuals licensed by the FCC with an interest in construction and operation of radio equipment, usually as a hobby or vocation.

(3) "Ancillary equipment facility ~~(AEF)~~" means ancillary equipment and/or an unstaffed structure used to contain ancillary equipment for a personal wireless service facility ~~WCF~~. Such structures include cabinets, shelters, remodeled structures, pedestals and other similar structures. Ancillary equipment ~~may include~~ means equipment necessary for the functioning of personal wireless service facilities, which may include but is not limited to air conditioners and backup power supplies (including emergency generators).

(4) "Antenna" means an apparatus designed for the purpose of emitting radiofrequency radiation, to be operated or operating from a fixed location pursuant to Federal Communication Commission (FCC) authorization, for the provision of personal wireless service and any commingled information services. ~~means any pole, panel, reflection disc, or similar device used for the transmission or reception of radio frequency signals, including but not limited to directional antennas, omni-directional antennas, and parabolic antennas.~~

Rationale: The definition of "antenna" has been modified for consistency with 47 CFR 1.6002(b).

(5) "Antenna array" means any system of poles, panels, rods, reflecting discs or similar devices used for the transmission or reception of radio frequency signals. An antenna array can be made up of one or more antennas including but not limited to the following:

(a) Directional antenna (also known as a panel antenna) which transmits signals in a directional pattern of less than 360 degrees.

(b) Omni-directional antenna (also known as a whip antenna) which transmits signals in a 360-degree pattern.

(c) Parabolic antenna (also known as a dish antenna) which is a bowl-shaped device that receives and transmits signals in a specific directional pattern (e.g., point-to-point).

(6) "Antenna equipment" means equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when collocated on a structure, is mounted or installed at the same time as such antenna.

Rationale: The definition of "antenna equipment" has been inserted for consistency with 47 CFR 1.6002(c).

(7) "Antenna facility" means an antenna and associated antenna equipment.

Rationale: The definition of "antenna facility" has been inserted for consistency with 47 CFR 1.6002(d).

~~(86)~~ “Attached wireless communication support structure” is a support structure not specifically designed and constructed to support an antenna array. Such structures may include but are not limited to buildings or structures, utility poles, signs, and water towers, together with any accompanying pole or device (attachment device) which attaches the antenna array to the existing building or structure.

~~(97)~~ “Attached wireless communication facility” is a personal wireless service communication facility that utilizes an attached wireless communication support structure ~~as defined in subsection (6) of this section.~~ It means the site, the leased area, attached wireless communication support structures, antennas, antenna array(s), ~~accessory ancillary equipment facilities~~ structures, and appurtenances used to transmit, receive, distribute, provide or offer personal wireless communication, together with any accompanying pole or device (attachment device) which attaches the antenna array to the existing building or structure, transmission cables, and an ancillary equipment facility which may be located either inside or outside of the attachment structure.

~~(108)~~ “Citizens band radio” means two-way radio facilities operated for short-range personal and business communications, without necessity of a federal license, ~~pursuant to 47 Congressional Federal Register Part 95.~~

~~(9)~~ “Clustering” means the placement of more than one wireless communication support structure on a single site either by one provider or by several different providers.

Rationale: The term “clustering” is not used in the proposed amendments to WCC 20.13.

(11) “Collocation” means:

(a) Mounting or installing an antenna facility on a pre-existing structure; and/or

(b) Modifying a structure for the purpose of mounting or installing an antenna facility on that structure.

The definition of “collocation” in WCC 20.13.025 applies to eligible facilities requests.

~~(10) “Collocate” means the installation of wireless services equipment on a freestanding or attached wireless communication facility that may be shared by one or more wireless service providers to transmit and/or receive radio frequency signals for communication purposes. For the purposes of this chapter, the terms “collocate”, “collocation” or “co-locate” may be used interchangeably to describe action taken by a principal facility owner, an authorized agent, or a valid lessee to add wireless services equipment to an existing facility. Note: The spelling of these terms may vary based on local vernacular used by wireless service industry professionals, and in accordance with state and federal law.~~

Rationale: The definition of “collocation” has been modified for consistency with 47 CFR 1.6002(g).

(12) “Deployment” means placement, construction, or modification of a personal wireless service facility.

Rationale: The definition of “deployment” has been inserted for consistency with 47 CFR 1.6002(h).

(1311) “Direct-to-home satellite service” means the distribution or broadcasting of programming or services by satellite directly to the subscriber’s premises without use of ground receiving or distribution equipment, except at the subscriber’s premises or in the uplink process to the satellite.

(1412) “FAA” means the Federal Aviation Administration.

(1513) “FCC” means the Federal Communications Commission.

(1614) “Freestanding wireless communication facilities” means the site, the lease area, freestanding wireless communication support tower(s), antennas, antenna array(s), ~~accessory~~ ancillary equipment ~~facilities~~ structures, and appurtenances used to transmit, receive, distribute, provide or offer personal wireless ~~communication~~ services. Freestanding wireless communication facilities include but are not limited to antennas, poles, towers, cables, wires, conduits, ducts, pedestals, vaults, buildings, and electronic switching equipment.

(1715) “Freestanding wireless communication support structure” is a freestanding structure, designed and constructed to specifically support an antenna array, and may include but is not limited to any of the structures listed below:

(a) “Lattice tower” means a wireless communication support structure which consists of a network of vertical and horizontal supports and crossed metal braces, forming a tower which is usually triangular or square in cross-section.

(b) “Monopole tower” means a wireless communication support structure consisting of a single pole to support antennas and connecting appurtenances.

(c) “Guyed tower” means any variety of wireless communication support structures using wire guys connecting above grade portions of a communication support structure diagonally with the ground or the structure on which the tower is placed. The purpose of the wire guys is to provide support for wireless communication towers, antennas, and connecting appurtenances.

(18) “Macro wireless facilities” means any personal wireless service facilities that:

(a) Do not qualify as an exemption pursuant to WCC 20.13.030;

(b) Are not eligible facilities requests;

(c) Are not permitted replacement of components; and

(d) Are not small wireless facilities.

Rationale: The subject amendments relate to wireless eligible facilities requests, small wireless facilities, and macro wireless facilities. Eligible facilities requests and small wireless facilities are classifications of wireless facilities that are set apart in the Code of Federal Regulations from other (larger) wireless facilities. The FCC Declaratory Ruling and Third Report and Order in the matter of *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (adopted September 26, 2018) indicates “. . . While the existing wireless infrastructure in the U.S. was erected primarily using macro cells with relatively large antennas and towers, wireless networks increasingly have required the deployment of small cell systems to support increased usage and capacity. . .” (page 9). The proposal adopts the “macro” facility language to signify larger wireless installations.

(19) “Personal wireless service facility” means an antenna facility or a structure that is used for the provision of personal wireless service, whether such service is provided on a stand-alone basis or commingled with other wireless communications services. Personal wireless service facilities include, but are not limited to, antennas, poles, towers, cables, wires, conduits, ducts, pedestals, vaults, buildings, and electronic and switching equipment. ~~(16) “Personal wireless communication services” means wireless communication services.~~

Rationale: The first sentence is the definition of “personal wireless service facility” from 47 CFR 1.6002(i). The second sentence is elaboration from the definition of “wireless communication facilities” below, which is proposed to be deleted.

~~(2017)~~ “Satellite earth station” means the facilities used for reception and processing of programming services from a satellite prior to transfer to terrestrial distribution systems or for processing of programming and services from a terrestrial source before transmission via satellite.

~~(2118)~~ Site. For the purpose of this chapter, “sSite” means a leased area which may contain a base station, building(s) or structure in compliance with provisions of Whatcom County subdivision regulations, site easement area or lot of record upon which a wireless communications facility is or will be located. The definition of “site” in WCC 20.13.025 applies to eligible facilities requests.

(22) “Small wireless facilities” are facilities that meet each of the following conditions:

(a) The facilities—

(i) Are mounted on structures 50 feet or less in height including their antennas as defined in 47 CFR 1.1320(d); or

(ii) Are mounted on structures no more than 10 percent taller than other adjacent structures; or

(iii) Do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(b) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in 47 CFR 1.1320(d)), is no more than three cubic feet in volume;

(c) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(d) The facilities do not require antenna structure registration under 47 CFR part 17 (Construction, Marking, and Lighting of Antenna Structures);

(e) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(f) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in 47 CFR 1.1307(b).

Rationale: The definition of “small wireless facility” has been inserted for consistency with 47 CFR 1.6002(l).

(23) “Structure” means a pole, tower, base station, or other building, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service (whether on its own or comingled with other types of services).

Rationale: The definition of “structure” has been inserted for consistency with 47 CFR 1.6002(m).

~~(2419)~~ “Unlicensed wireless services” means commercial mobile services that operate on public frequencies and do not need a FCC license.

~~(20) “Wireless communication facilities” means facilities for the provision of wireless service. Wireless communication facilities include, but are not limited to, antennas, poles, towers, cables, wires, conduits, ducts, pedestals, vaults, buildings, and electronic and switching equipment.~~

~~(2521)~~ “Wireless communication service” means wireless data and telecommunications services, including commercial mobile services, commercial mobile data services, unlicensed wireless services, and common carrier wireless exchange access services, as defined by federal laws and regulations.

~~(22) “Substantially change the physical dimensions” means:~~

~~(a) The installation or mounting of wireless services equipment on an existing support structure that would increase the overall height of the structure by more than 10 percent, or 20 feet, whichever is greater; provided, that any such increase in height must conform to the provisions of this chapter; or~~

~~(b) The installation or mounting of equipment that would involve adding an appurtenance to the body of the structure that would protrude from the edge of the structure more than 20 feet or more than the width of the structure at the level of the appurtenance, whichever is greater; provided, that in making determinations as to whether or not project proposals constitute a substantial change as described in this subsection, and in order to limit incremental and cumulative effects concerning the overall size of such facilities, measurements shall be taken to establish a base line for determining whether or not proposed changes constitute a substantial change; such measurements shall be taken from the dimensions of the existing facility as it was approved and constructed under the original building permit issued by Whatcom County. (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000).~~

Rationale: A definition of “substantially change” has been inserted in the definitions relating to eligible facility requests below, consistent with 47 CFR 1.6100(b)(7).



**20.13.025 Definitions - Eligible facilities requests.**

The following definitions shall only apply to eligible facilities requests:

(1) "Base station" means a structure or equipment at a fixed location that enables FCC licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined in this section or any equipment associated with a tower.

(a) The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

(b) The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems and small-cell networks).

(c) The term includes any structure other than a tower that, at the time the relevant application is filed with the County for an eligible facilities request, supports or houses equipment described in subsections (a) and (b) above that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing such support.

(d) The term does not include any structure that, at the time the relevant application is filed with the County for an eligible facilities request, does not support or house equipment described in subsections (a) and (b) above.

(2) "Collocation" means the mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.

(3) "Eligible facilities request" means any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving:

(a) Collocation of new transmission equipment;

(b) Removal of transmission equipment; or

(c) Replacement of transmission equipment.

(4) "Eligible support structure" means any tower or base station as defined in this section, provided that it is existing at the time the relevant application is filed with the County for an eligible facilities request.

(5) “Existing” means a constructed tower or base station that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition.

(6) “Site” means, for towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground. The current boundaries of a site are the boundaries that existed as of the date that the original support structure or a modification to that structure was last reviewed and approved by a State or local government, if the approval of the modification occurred prior to the Spectrum Act (Middle Class Tax Relief and Job Creation Act of 2012, which was signed into law on February 22, 2012) or otherwise outside of the eligible facilities request review process.

(7) “Substantially change the physical dimensions” means a modification of an eligible support structure that meets any of the following criteria:

(a) For towers other than towers in the public rights-of-way, it increases the height of the tower by more than 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; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater;

(i) Changes in height are measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height are measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act (Middle Class Tax Relief and Job Creation Act of 2012) on February 22, 2012.

(ii) The phrase “with separation from the nearest existing antenna not to exceed twenty feet” allows an increase in the height of the tower of up to twenty feet between antennas, as measured from the top of an existing antenna to the bottom of a proposed new antenna on the top of a tower.

(b) For towers other than towers in the public rights-of-way, it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for other eligible support structures, it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet;

(c) For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure. The term "equipment cabinets" does not include relatively small electronic components, such as remote radio units, radio transceivers, amplifiers, or other devices mounted on the structure, and up to four such cabinets may be added to an existing facility for each separate eligible facilities request;

(d) It entails any excavation or deployment outside of the current site, except that, for towers other than towers in the public rights-of-way, it entails any excavation or deployment of transmission equipment outside of the current site by more than 30 feet in any direction. The site boundary from which the 30 feet is measured excludes any access or utility easements currently related to the site;

(e) It would defeat the concealment elements of the eligible support structure. The term "concealment element" means an element that is part of a stealth-designed facility intended to make a structure look like something other than a wireless facility, and that was part of a prior approval. Examples of concealment elements include painting to match the supporting façade and making the structure look like a tree or flag pole. To "defeat" a concealment element, a proposed modification must cause a reasonable person to view a structure's intended stealth design as no longer effective; or

(f) It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in subsections (a) through (d) above. The phrase "conditions associated with the siting approval" may include aesthetic conditions to minimize the visual impact of a wireless facility as long as the condition does not prevent modifications explicitly allowed under subsections (a) through (d) above (height, width, equipment cabinets, and excavations or deployments outside the current site) and so long as there is express evidence that at the time of approval the locality required the feature and conditioned approval upon its continuing existence. Examples of aesthetic conditions include requiring a specific placement, requiring a shroud, requiring walls or fences, setbacks, location behind a tree-line, and landscaping.

(8) "Tower" means any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as

well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site.

(9) “Transmission equipment” means equipment that facilitates transmission for any FCC-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

Rationale: The above definitions are primarily from 47 CFR 1.6100. Minor changes have been made, such as changing “Commission” to “FCC” and referencing subsections of this proposed code instead of subsections of the CFR. The FCC’s *Declaratory Ruling and Notice of Proposed Rulemaking* (June 2020, pages 7, 8, 18, 20, 23, and 24) elaborated on the definition of “Substantial change” by clarifying the meaning of:

- The phrase “with separation from the nearest existing antenna not to exceed twenty feet”;
- Equipment cabinets;
- Concealment element;
- To defeat a concealment element; and
- Conditions associated with siting approval.

These FCC clarifications have been incorporated into the definition of “Substantially change” above (language and concepts from the FCC’s 2020 Declaratory Ruling have been inserted in italics). Staff has added an example of a “condition associated with siting approval” shown in bold.

**20.13.030 Applicability – Exemptions.**

The requirements of this chapter shall apply to all new personal wireless ~~service~~communication facilities and the expansion and/or alteration of any existing personal wireless ~~service~~communication facilities, except that, the following are exempt from the provisions of this chapter:

- (1) Satellite earth stations using antenna(s) not more than two meters in diameter in commercial and industrial districts and direct-to-home satellite services.
- (2) Send and receive citizen band radio antennas or antennas operated by federally licensed amateur (“ham”) radio operators.
- (3) Industrial, scientific and medical equipment using frequencies regulated by the FCC.
- (4) Electronic communications structures and telecommunication towers including associated maintenance and operations structures that do not qualify as “personal wireless service facilities” and, therefore, are regulated under WCC 20.82. ~~Military and government radar antennas and associated communication towers used for navigational purposes as regulated by the FCC under 47 Congressional Federal Register Parts 97 and 95 respectively.~~

Rationale: The above language was inserted for consistency with the language of WCC 20.82.030(5). It would also point the reader to WCC 20.82 for rules relating to facilities that do not fit within the definition of “personal wireless service facilities.”

(5) Military and federal, state and local government communications facilities used for emergency preparedness and public safety purposes, which are regulated under WCC 20.82.

Rationale: The above facilities are permitted uses pursuant to WCC 20.82.021.  
Inserting the reference will point the reader to that section of the code.

(6) Normal, routine and emergency maintenance and repair of existing personal wireless service communications facilities and related equipment which do not increase the size, footprint or bulk of such facilities and which otherwise comply with the county, state, and federal law and regulations; provided, that compliance with design and development standards of this chapter is maintained.

(7) Personal wireless service facilities in the County right-of-way, provided that the applicant obtains other necessary County authorizations (e.g. revocable encroachment permit and/or franchise agreement).

(8) Personal wireless service facilities in the State right-of-way, provided that the applicant obtains necessary state authorizations.

(Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000).

**20.13.040 Permitted uses.**

.041 Eligible facilities requests.

.042 Collocation of small wireless facilities using existing structures.

Rationale: Regarding eligible facility requests, 47 CFR 1.6100(c) indicates: "A State or local government may not deny and shall approve any eligible facilities request for modification of an eligible support structure that does not substantially change the physical dimensions of such structure. . . Within 60 days of the date on which an applicant submits a request seeking approval under this section, the State or local government shall approve the application unless it determines that the application is not covered by this section. . ."

Regarding small wireless facilities, 47 CFR 1.6003(c) states: "The following are the presumptively reasonable periods of time for action on applications seeking authorization for deployments . . . (i) Review of an application to collocate a Small Wireless Facility using an existing structure: 60 days. . ."

The FCC's Declaratory Ruling and Third Report and Order (September 26, 2018) states:

. . . Industry commenters contend that the shot clocks should apply to all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment. . . we find that "any request for authorization to place, construct, or modify personal wireless service facilities" under [CB](ii) means all authorizations necessary for the deployment of personal wireless services infrastructure. . . (pages 68-69, paragraph 132).

Furthermore, 47 CFR 1.6002(f) states "Authorization means any approval that a siting authority must issue under applicable law prior to the deployment of personal wireless service facilities, including, but not limited to, zoning approval and building permit." It would be very difficult, if not impossible, to process an administrative approval use permit or conditional use permit, along with other required permits, within the 60 day time-frame allowed by the federal rules. Therefore, the proposal is to allow eligible facilities requests and small wireless facilities using existing structures as permitted uses.

The following uses shall be considered permitted uses and shall comply with federal, state, and local laws and regulations and the provisions of this chapter (including but not limited to WCC 20.13.120); the following uses shall also be subject to environmental review under the State Environmental Policy Act (SEPA), unless categorically exempt:

~~.043 (1) Replacement construction. In all districts: Replacement of any component of an existing freestanding or attached personal wireless service communication facility, and/or replacement of any component of an existing ancillary equipment facility on existing, approved and conforming sites that does not increase the physical dimensions of the components being replaced.~~

~~; provided, that such replacement does not increase the total number of components lawfully existing on the site at the time of application for such replacement construction; and further provided, that such replacement construction does not “substantially change the physical dimensions” of the individual components being replaced as defined in WCC 20.13.020(22).~~

~~Determinations made as to whether or not replacement proposals substantially change the physical dimensions of existing facilities shall be made by the administrator, as follows:~~

~~(a) The applicant or applicant’s agent must submit documentation to the administrator that demonstrates that replacement construction proposals do not substantially change the physical dimensions of such facilities as defined in WCC 20.13.020(22). Examples of such documentation may include specification sheets and/or area calculations for both the existing and proposed replacement equipment. Such documentation must be submitted at the time of preapplication interview for the required commercial building permit(s).~~

~~(b) The applicant or applicant’s agent must also submit documentation to the administrator demonstrating that replacement construction meets Federal Communications Commission (FCC) Emission Standards (as applicable). Such documentation must be submitted at time of application for the required commercial building permit(s).~~

~~(2) New antenna or new antenna array construction. In all districts: New antennas or new antenna arrays may be constructed on or added to existing, attached or freestanding wireless communication facilities on existing, approved and conforming sites; provided, that such new antennas or antenna arrays do not “substantially change the physical dimensions” of such facilities, as defined in WCC 20.13.020(22).~~

~~Determinations made as to whether or not new construction proposals substantially change the physical dimensions of existing facilities shall be made by the administrator, as follows:~~

~~(a) The applicant or applicant’s agent must submit documentation to the administrator that demonstrates that the proposed new antenna or new antenna array construction does not substantially change the physical dimensions of such facilities. Examples of such documentation may include specification sheets and/or area calculations for both the existing and the proposed new equipment.~~

Such documentation must be submitted at the time of pre-application interview for the required commercial building permit(s).

(b) The applicant or applicant’s agent must also submit documentation to the administrator that demonstrates that any new antenna(s) meet Federal Communications Commission (FCC) Emission Standards (as applicable). Such documentation must be submitted at time of application for the required commercial building permit(s). (Ord. 2017-030 § 1 (Exh. N), 2017; Ord. 2014-042 § 1 (Att. A), 2014).

**20.13.050 Administrative approval uses.**

.051 Small wireless facilities on a new structure.

.052 Collocation of macro wireless facilities using an existing structure.

.053 New ancillary equipment facilities that:

- (1) Do not qualify as eligible facilities requests;
- (2) Do not qualify as small wireless facilities; and
- (3) Are not part of a macro wireless facility using a new structure.

Rationale: Regarding small wireless facilities and macro wireless facilities, 47 CFR Section 1.6003(c) states that the following are the presumptively reasonable periods of time for action on applications seeking authorization for deployments . . .

- (ii) Review of an application to collocate a facility other than a Small Wireless Facility using an existing structure: 90 days.
- (iii) Review of an application to deploy a Small Wireless Facility using a new structure: 90 days. . .

A facility “other than a Small Wireless Facility” is called a “macro wireless facility” in the proposed regulations.

The FCC’s Declaratory Ruling and Third Report and Order (September 26, 2018) states:

. . . Industry commenters contend that the shot clocks should apply to all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment. . . we find that “any request for authorization to place, construct, or modify personal wireless service facilities” under [47 US Code] Section 332(c)(7)(B)(ii) means all authorizations necessary for the deployment of personal wireless services infrastructure. . . (pages 68 and 69, paragraph 132).

Furthermore, 47 CFR 1.6002(f) states “Authorization means any approval that a siting authority must issue under applicable law prior to the deployment of personal wireless service facilities, including, but not limited to, zoning approval and building permit.”

It would be very difficult to process a conditional use permit, along with other required permits, within the 90 day time-frame allowed by the federal rules. Therefore, the proposal is to allow small wireless facilities on new structures and macro wireless facilities using existing structures as administrative approval uses. These structures would have more impact than the proposed uses allowed in the permitted use section, so it is reasonable to provide notice and seek comments from neighboring property owners and the public.

The following uses are considered administrative approval uses and shall require a wireless communication facility (WCF) permit in accordance with Chapters 22.05 and 20.84 WCC, and shall be subject to a threshold determination in accordance with the Whatcom County SEPA Ordinance unless categorically exempt; provided, that WCF permit proposals located in nonresidential related districts shall be exempt from the public noticing requirements found in Chapter 22.05 WCC, Project Permit Procedures.

Uses described in this section must comply with county, state, and federal law and regulations and all applicable provisions of this chapter. The administrator may refer an application for a WCF permit to a technical review committee for its review prior to making a decision on the application.

(1) ~~Wireless Communication Facility (WCF) Permit. New freestanding wireless communication support structures, new antennas or antenna arrays on existing freestanding or attached wireless communication structures on existing approved and conforming sites, and new attached wireless communication facilities that substantially change the physical dimensions of a facility as defined in WCC 20.13.020(22) may be approved by the administrator through issuance of a WCF permit, subject to a required commercial building permit. Prior to application approval, the applicant or applicant's agent must also submit documentation to the administrator that demonstrates that any new antenna(s) meet Federal Communication Commission (FCC) emission standards (as applicable).~~

~~(a) New Freestanding Wireless Communication Support Structures.~~

~~(i) New freestanding wireless communication support structures (lattice towers or monopole towers) may be collocated or clustered on existing, approved and conforming wireless communication facility sites in the following residential related districts: Rural, Residential Rural, and Rural Residential Island.~~

~~(ii) New freestanding wireless communication support structures (monopoles only) may be collocated or clustered on existing, approved and conforming wireless communication facility sites in the following residential related districts: Urban Residential, Urban Residential Medium, Urban Residential Mixed, Neighborhood Commercial, and Eliza Island; provided, that the site does not also contain residential uses.~~

~~(iii) Monopoles that are permitted as a WCF may exceed the height limits of the underlying residential related zone by 15 feet; provided, the applicant demonstrates that the structure's height is the minimum necessary to adequately function, or if collocation is specifically provided for on the tower. The additional 15 feet for collocation may be added to the 15 feet necessary for adequate function for a total of 30 feet in the event both situations pertain.~~

~~(iv) In all nonresidential districts: New freestanding wireless communication support structures (lattice towers or monopole towers) may be collocated or clustered on approved and conforming sites; provided, that the height of such structures shall be subject to requirements of WCC 20.13.092(9)(b); and provided further, that the height does not exceed 150 feet. Additional height may be approved only by special exception as provided in WCC 20.13.110.~~



(b) ~~New Attached Wireless Communication Facilities. New attached wireless communication facilities may be approved by the administrator through issuance of a WCF permit, and subject to a required commercial building permit(s), as provided below:~~

~~(i) In all residential districts: new attached wireless communication facilities or new antennas attached to existing attached wireless communication structures that utilize a nonresidential structure on a parcel or lot not used primarily for residential purposes; provided, the antenna is not more than 15 feet above the roof or parapet wall or top of structure (if not a building). Installation of dish antennas on the roof of an attached wireless communication structure may be permitted as a WCF permit if the applicant demonstrates to the administrator that such proposal satisfies the special exception criteria pursuant to WCC 20.13.110.~~

~~(ii) In all nonresidential related districts: Ground-mounted dish antennas may be located on existing approved, conforming sites; provided, that the site is not used exclusively for residential purposes.~~

~~(iii) In all residential related districts: Ground-mounted dish antennas may be located on existing approved, conforming sites; provided, that the site is not used exclusively for residential purposes and the antenna is not more than 15 feet above ground level nor more than 12 feet in diameter.~~

~~(c) New antennas or antenna arrays on existing freestanding wireless communication facilities or existing attached wireless communication facilities on existing, approved and conforming sites may be approved by the administrator through issuance of a WCF permit, and subject to required commercial building permit(s):~~

~~(i) In all nonresidential districts: New antennas or antenna arrays may be added to existing freestanding wireless communication support structures on existing approved and conforming sites; provided, that the height of such new antennas or antenna arrays shall not extend more than 15 feet above the attachment device.~~

~~(ii) In all residential districts: New antennas or antenna arrays may be added to existing freestanding wireless communication support structures on approved and conforming sites; provided, that the height of such new antennas or antenna arrays shall be subject to the requirements of WCC 20.13.092(9)(b).~~

~~(iii) In all residential districts: new antennas on existing attached wireless communication structures that utilize a nonresidential structure on a parcel or lot not used primarily for residential purposes; provided, the antenna is not more than 15 feet above the roof or parapet wall or top of structure (if not a building). Installation of dish antennas on the roof of an attached wireless communication structure may be permitted as a WCF permit if the applicant demonstrates to the administrator that such proposal satisfies the special exception criteria pursuant to WCC 20.13.110.~~

~~(iv) In all nonresidential related districts: new antennas attached on existing attached wireless communication structures that utilize a nonresidential structure on a parcel or lot not used primarily for residential purposes; provided, the antenna is not more than 15 feet above the roof or parapet.~~

~~(2) Ancillary Equipment Facilities:~~

~~(a) New ancillary equipment facilities or replacement construction that substantially increases the physical dimensions of an existing facility as defined in WCC 20.13.020(22) may be permitted on existing approved, conforming sites as an ancillary equipment facility (AEF) under the scope of a WCF permit. Such structures include cabinets, shelters, remodeled structures, pedestals and other similar structures. Ancillary equipment may include air conditioners, emergency generators, and GPS units. Installation of such ancillary equipment when included in the scope of a WCF permit shall conform to original time frames for completion set by the administrator, or as further amended by the administrator. (Ord. 2018-032 § 1 (Exh. D), 2018; Ord. 2014-042 § 1 (Att. A), 2014).~~

**20.13.060 Conditional uses.**

.061 Macro wireless facilities using a new structure, including associated ancillary equipment facilities.

Rationale: 47 CFR Section 1.6003(c) states:

The following are the presumptively reasonable periods of time for action on applications seeking authorization for deployments . . .

- (iv) Review of an application to deploy a facility other than a Small Wireless Facility using a new structure: 150 days. . .

A facility “other than a Small Wireless Facility” is called a “macro wireless facility” in the proposed regulations.

The FCC’s Declaratory Ruling and Third Report and Order (September 26, 2018) states:

. . . Industry commenters contend that the shot clocks should apply to all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment. . . we find that “any request for authorization to place, construct, or modify personal wireless service facilities” under [47 US Code] Section 332(c)(7)(B)(ii) means all authorizations necessary for the deployment of personal wireless services infrastructure. . . (pages 68 and 69, paragraph 132).

Furthermore, 47 CFR 1.6002(f) states “*Authorization* means any approval that a siting authority must issue under applicable law prior to the deployment of personal wireless service facilities, including, but not limited to, zoning approval and building permit.”

The 150 day federal time frame would allow sufficient time to process a conditional use permit, along with a building permit, for these larger macro wireless facilities. These larger structures have the potential for greater visual impact than the proposed uses allowed in the permitted and administrative approval uses section. Therefore, it is reasonable to provide notice and hold a public hearing to allow comments from neighboring property owners and the public.

~~(1) The following uses shall require conditional use permit approval by the hearing examiner, and shall be processed in accordance with Chapters 22.05 and 20.84 WCC and shall be subject to a threshold determination in accordance with the Whatcom County SEPA Ordinance, unless categorically exempt. Such uses shall comply with county, state, and federal law and regulations and all applicable provisions of this chapter. The applicant or applicant's agent must also submit documentation to the administrator that demonstrates that any new antennas meet Federal Communication Commission (FCC) emission standards (as applicable). The administrator may refer an application for a conditional use to a technical review committee for review and comment prior to referring the application to the hearing examiner for a decision.~~

~~(a) New Freestanding Wireless Communication Facilities:~~

~~(i) In all nonresidential related districts: new freestanding wireless communication facilities that utilize lattice tower or monopole wireless communication support structures; provided, that the height of such structures shall be subject to the requirements of WCC 20.13.092(9)(b); and further provided, that the height does not exceed 150 feet. Additional height may only be approved by special exception as provided in WCC 20.13.110.~~

~~(ii) New freestanding wireless communication facilities that utilize lattice towers or monopole towers in the following residential related districts: Rural, Residential Rural, Rural Residential Island; provided, that the height of such structures shall be subject to the requirements of WCC 20.13.092(9)(b).~~

~~(iii) New freestanding wireless communication facilities that utilize monopole towers only in the following residential districts: Urban Residential, Urban Residential Medium, Urban Residential Mixed, Neighborhood Commercial, and Eliza Island; provided, that the site does not also contain existing residential uses; and further provided, that the height of such structures shall be subject to the requirements of WCC 20.13.092(9)(b).~~

~~(b) New Attached Wireless Communication facilities:~~

~~(i) In all nonresidential related districts: New attached wireless communication facilities that utilize a residential structure on a site used exclusively for residential purposes shall require a conditional use permit; provided, that the antenna shall not extend more than 15 feet above the roof or parapet.~~

~~(ii) In all residential districts: New attached wireless communication facilities that utilize an attached wireless communication support structure that is a residential building or on a parcel used exclusively for residential purposes shall require a conditional use permit; provided, that the antenna shall not extend more than 15 feet above the roof top (or top of the structure if not a building) and that the requirements of WCC 20.13.092(1) are met. The hearing examiner shall have the authority to restrict the height of the attached antenna to a figure less than 15 feet in order to attain compliance with WCC 20.13.092(1).~~

~~(2) New ancillary equipment facilities may be permitted under the scope of a conditional use permit, or may be permitted separately as an AEF under a WCF permit pursuant to WCC 20.13.050. Such structures include cabinets, shelters, remodeled structures, pedestals and other similar structures. Ancillary equipment may include air conditioners, emergency generators, and GPS units. Installation of such ancillary equipment when included in the scope of a conditional use permit shall conform to original time frames for completion set by the hearing examiner, or as further amended by the hearing examiner. (Ord. 2018-032 § 1 (Exh. D), 2018; Ord. 2014-042 § 1 (Att. A), 2014).~~

#### **20.13.070 Nonconforming uses and structures.**

Expansion of nonconforming personal wireless service facilities shall be treated as follows:

- (1) Eligible facilities requests are permitted uses that are required to comply with WCC 20.13, but shall not be subject to WCC 20.83.020.
- (2) Collocation of small wireless facilities using existing structures are permitted uses that are required to comply with WCC 20.13, but shall not be subject to WCC 20.83.020.
- (3) Collocation of a macro wireless facilities using existing structures, including associated ancillary equipment facilities, are administrative approval uses that are required to comply with WCC 20.13, but shall not be subject to WCC 20.83.020.
- (4) Other expansions shall be subject to WCC 20.83.020.

~~Freestanding and attached wireless communication facilities, and ancillary equipment facilities in operation as of the effective date of the ordinance codified in this chapter or amendment hereto, including vested applications for such facilities, that do not conform to the use standards or development standards of this chapter shall be subject to the provisions of Chapter 20.83 WCC governing nonconforming uses. Routine maintenance on existing towers and antennas is permitted as provided in WCC 20.13.030(6). However, any new construction other than routine maintenance on existing nonconforming towers, antennas, buildings or other facilities shall comply fully with the requirements of Chapter 20.83 WCC governing nonconforming uses, and this chapter. (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000. Formerly 20.13.040).~~

Rationale: The expansion of a nonconforming use currently requires a conditional use permit under existing WCC 20.83.020.

However, under federal rules, a local government has 60 days to process permits for eligible facilities requests and small wireless facilities using existing structures. It would be very difficult, if not impossible, to process a conditional use permit, along with other required permits, within the 60 day time-frame allowed by the federal rules. Therefore, the proposal is to allow eligible facilities requests and small wireless facilities using existing nonconforming structures as permitted uses.

Under federal rules, a local government has 90 days to process permits for collocation of macro wireless facilities using existing structures. It would be very difficult to process a conditional use permit, along with other required permits, within the 90 day time-frame allowed by the federal rules. Therefore, the proposal is to allow collocation of macro wireless facilities using existing structures as administrative approval uses.

Other expansions, such as increasing the height of an existing nonconforming macro tower, would still require a conditional use permit under WCC 20.83.020.

**20.13.080 Prohibited locations for small and macro wireless facilities.**

(1) New attached antennas or antenna arrays shall not be mounted, installed or affixed to a single-family residence, duplex or their accessory structures; this prohibition shall not apply to residential structures such as multifamily housing, condominiums, apartment buildings, hotels, rooming houses, and their appurtenant structures, such as parking garages, and storage buildings.

(2) New freestanding wireless communication support structures (lattice towers) are prohibited in Urban Residential, Urban Residential Medium, Urban Residential Mixed, Neighborhood Commercial, and Eliza Island districts.

(3) New freestanding wireless communication support structures (monopole towers and ground level dishes) are prohibited in Urban Residential, Urban Residential Medium, Urban Residential Mixed, Neighborhood Commercial, and Eliza Island districts on sites that also contain residential uses.

(4) New support structures are prohibited on lands within the jurisdiction of the Whatcom County Shoreline Program. (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2011-013 § 2 Exh. B, 2011; Ord. 2000-006 § 1, 2000. Formerly 20.13.050(4)).

Rationale: 47 CFR 1.6100(c) indicates: "A State or local government may not deny and shall approve any eligible facilities request for modification of an eligible support structure that does not substantially change the physical dimensions of such structure. . ." Because of this federal preemption, eligible facilities requests are not included in the types of wireless facilities that are prohibited in the above areas.

**20.13.085 Siting priorities for small and macro wireless facilities.**

(1) In reviewing applications for new freestanding wireless communication facilities, and new attached wireless communication facilities, the approving authority shall evaluate the proposal in relationship to the following siting priorities. Unless the facility will be located at the highest priority location, the applicant shall demonstrate that:

- (a) None of the higher priority locations are available; or
- (b) If one is available it is not a feasible location for the proposed facility, based upon a feasibility study demonstrating that higher priority locations have been explored and are not feasible or available; or
- (c) If feasible, the location is less desirable than the one proposed from the standpoint of minimizing impacts on surrounding land uses.

Rationale: The subject proposal includes deleting WCC 20.13.130(1)(a) because it is largely redundant. However, this section does mention a feasibility study that should be preserved in the code. Therefore, feasibility study language has been inserted above.

(2) For the purpose of this chapter:

- (a) Residential related districts include Urban Residential (UR), Urban Residential Medium (URM), Urban Residential Mixed (UR-MX), Eliza Island (EI), Neighborhood Commercial (NC), Residential Rural (RR), Rural Residential Island (RR-I), and Rural (R) Districts;
- (b) Nonresidential related districts include:
  - (i) Commercial districts, including Rural General Commercial (RGC), Small Town Commercial (STC), General Commercial (GC), Resort Commercial (RC) and Tourist Commercial (TC) Districts; and
  - (ii) Industrial districts including Heavy Impact Industrial (HII), Light Impact Industrial (LII), ~~Gateway Industrial (GI)~~, Rural Industrial and Manufacturing (RIM), General Manufacturing (GM), and Airport Operations (AO) ~~and the Cherry Point Industrial District (CP-ID)~~; and
  - (iii) Resource districts including Agriculture (AG), Commercial Forestry (CF), Rural Forestry (RF) and Recreation Open Space (ROS).

Rationale: The Small Town Commercial zone was inadvertently omitted from the above list of commercial zoning districts. The last Gateway Industrial zoned land was annexed into a city and this zoning district has been removed from the Whatcom County Zoning Code. The Cherry Point Industrial District is an overlay zone that encompasses Heavy Impact Industrial and Light Impact Industrial zones (which are already mentioned above).

(3) Siting Priorities. Listed in descending order with the highest priority first:

(a) Collocated antennas on attached wireless communication support structures that are nonresidential buildings and structures, and collocated antennas on existing freestanding wireless communications towers in nonresidential related districts.

(b) Collocated antennas on attached wireless communication support structures that are nonresidential buildings and structures, and collocated antennas on existing freestanding wireless communications towers in residential related districts on property not used exclusively for residential purposes.

~~(c) New antennas on attached wireless communication structures such as nonresidential buildings and structures in nonresidential related districts.~~

Rationale: An attached wireless communication support structure is “. . . a support structure not specifically designed and constructed to support an antenna array. . .” such as a building or water tower (WCC 20.13.020(8)). Collocation includes mounting an antenna (presumably, a new antenna) on a pre-existing structure (proposed WCC 20.13.020(11)). A collocated antenna on an attached wireless communication support structure and a new antenna on such a structure are the same thing. Since subsection (a) already addresses collocated antennas on existing structures, subsection (c) addressing new antennas on existing structures is redundant and not needed.

~~(c)~~ (d) New freestanding wireless communication support structures in low visual impact locations in resource and industrial districts.

~~(d)~~ (e) New attached wireless communication facilities that utilize nonresidential buildings and structures in residential related zones on property not used exclusively for residential purposes.

~~(e)~~ (f) New freestanding wireless communication support structures at low visual impact locations in commercial districts.

~~(f)~~ (g) Locations other than those listed above. (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2011-013 § 2 Exh. B, 2011; Ord. 2000-006 § 1, 2000. Formerly 20.13.050(1) – (3)).

**20.13.090 Design and development standards for small and macro wireless facilities.**

.091 Design and Development Standards. ~~The development standards set forth below shall apply to all wireless communication facilities. These development standards are minimum standards and shall be in addition to any development standards or project review process which applies in the underlying district in which a personal wireless service communication facility is located. In the event of a conflict between the provisions of this chapter and the general development standards of this title, or the~~

~~project review process~~, the more stringent provision shall govern; provided, that where a provision of this chapter is the more specific in its application to personal wireless service~~communication~~ facilities, that provision shall prevail regardless of stringency.

- (1) Anti-Climbing Devices. All freestanding and attached wireless communication support structures and ~~required fencing~~ shall be equipped with appropriate anti-climbing devices.

Rationale: In an email dated June 23, 2022, an industry representative asked for:

. . . clarification on the requirement for anticlimbing devices on all facilities and on the fencing. For building mounted sites, I am not sure what that would look like and for fencing, the only anticlimbing device that comes to mind is barbed wire, which is tough aesthetically. . .

The industry representative made similar comments at the June 23, 2022 Planning Commission hearing.

At the request of the Planning Commission, Planning and Development Services staff met on July 6, 2022 to discuss this provision. PDS finds that there are anti-climbing devices that may be appropriate for antennas attached to existing buildings (such a locked metal plate over wall mounted ladders). However, given that anti-climbing devices are required on a tower (such as anti-climbing sheets on the tower supports), it does not appear that a fence around the tower would need additional anti-climbing devices. Barbed wire has generally not been required on such fences. Therefore, fencing may be deleted from the anti-climbing provision above.

- (2) Attachment to Trees Prohibited. It is prohibited to attach any personal wireless communication service facility or portion thereof to any tree.

- (3) Signage. All freestanding and attached wireless communication support structures shall be identified with a nonilluminated sign not exceeding four square feet. The sign shall list the wireless service provider’s name and emergency telephone number and shall be posted in a place visible to the general public. Safety signs required by applicable laws and regulations are also permitted. No ~~other advertising~~ signs shall be located on support structures or antennas; ~~however, arrays may be camouflaged as otherwise permitted signs.~~

Rationale: The existing text would allow signs with a non-advertising message but not signs with an advertising message. However, sign regulations are to be content neutral in accordance with U.S. Supreme Court’s decision in *Reed v. Town of Gilbert* (2015).

- (4) Lighting. All freestanding and attached wireless communication facilities shall not be illuminated except where required by the FAA.

- (5) Painting. All freestanding and attached wireless communication facilities shall be painted or finished in a manner that blends with the dominant color of the background except where otherwise required by the FAA. The applicant and the operator of the facility shall have a continuing duty to maintain such paint or finish.



~~(6) Noise from Accessory Equipment. Accessory equipment facilities shall comply with state noise level standards under Chapter 173-60 WAC, as amended. Generators may only be permitted for emergency operation purposes. If air conditioning or other noise-generating equipment is proposed, the applicant shall provide information detailing the expected noise level and any proposed abatement measures. This may require noise attenuation devices or other mitigation measures to minimize impacts.~~

Rationale: Noise requirements have been modified and moved to proposed WCC 20.13.105.

~~(67) Copies of deeds or other instruments such as lease agreements and site easements that establish the applicant's right to use the site shall be provided at the time of application. These may be in unsigned final draft form pending the outcome of the approval process. The boundaries of a proposed personal wireless service communications facility site shall be defined in each such instrument in a manner that will provide a land surveyor sufficient information to accurately locate the site boundaries using standard survey methods. The applicant may redact proprietary information or lease terms that are not relevant to establishing the applicant's right to use the site or defining the site boundaries.~~

~~(78) If the proposed site is leased, the terms of the lease shall not restrict the land owner in any way from leasing other areas of his property to other wireless communications providers with the exception that the lease may include a provision that any additional facilities so located not materially interfere with the operation of the existing facility.~~

#### ~~092 General Design Standards.~~

~~(81) Antennas that are mounted, installed or affixed to an attached wireless communication support structure shall be designed or placed to blend with the predominant background or architectural features as seen from abutting residential uses, roadways or other public rights-of-way.~~

~~(92) When located on buildings, panel antennas shall be placed closely against walls or parapets and not extend above the wall or parapet unless an alternative design is required to (a) achieve better compatibility with the building design or (b) to obtain antenna function. In the alternative, antennas may be placed on an attached wireless communication support structure if designed with concealment elements, screened or otherwise obscured from view in a manner compatible with the structure's design. Such antennas shall not extend more than 10 feet above the top of the structure.~~

Rationale: In an email dated June 23, 2022, and in comments at the June 23, 2022 Planning Commission hearing, an industry representative asked for greater flexibility to mount antennas on rooftops.

At the request of the Planning Commission, Planning and Development Services staff met on July 6, 2022 to discuss this issue.

WCC 20.13.085 contains siting priorities for small and macro wireless facilities. This section of the Zoning Code states that collocated antennas on existing structures are the highest priority locations in the County. New freestanding towers or support structures are a lower priority. Given that locating new antennas on existing structures is a higher priority, it makes sense to provide flexibility in the language above.

~~(103)~~ Ancillary equipment facility structures shall be placed underground or wholly enclosed in an existing structure or building, or designed to blend into the architecture and landscaping of the surrounding buildings or structures. When equipment boxes are placed at ground level, they shall be screened from view.

~~(114)~~ Ground-mounted dishes shall be located outside any required landscaped area and preferably located in service areas or other less visible locations. They shall be solidly screened to at least as high as the center of the dish when viewed from off the site. Solid screening shall be provided as high as the top of the dish on sides adjacent to residential zones.

Roof-mounted dishes shall be solidly screened at least as high as the center of the dish. The screening shall be of a material and design compatible with the building, and can include penthouse screening, parapet walls, or other similar screening. The dish should be placed as close to the center of the roof as possible.

~~(5) Antennas on utility poles shall be limited to antennas that are no more than two feet in length unless the approving authority finds that the visual impact of a longer antenna would not have an appreciable effect on surrounding uses. No more than one antenna is permitted per pole. No utility pole shall be extended in height in order to accommodate an antenna. No antenna shall be allowed on light standards.~~

Rationale: 47 US Code 253(a) indicates that “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Additionally, 47 US Code 332(c)(7)(B)(i) states: “The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”

The FCC Declaratory Ruling and Third Report and Order in the matter of *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (adopted September 26, 2018) states:

. . . The “effectively prohibit” language must have some meaning independent of the “prohibit” language . . . our interpretation that ‘effective prohibition’ does not require a showing of an insurmountable barrier to entry is demonstrated not only by a number of circuit courts’ acceptance of that view, but in the Supreme Court’s own characterization of Section 253(a) as “prohibit[ing] state and local regulation that *impedes* the provision of ‘telecommunications service’”. . . (paragraph 41).

Initially, it should be noted that utility poles are often located in the road right-of-way. Additionally, the County Engineer indicated, in an e-mail of October 20, 2021, that he is not aware of any County light standards (street lights or traffic lights) located outside the County right of way and that all County-owned facilities should be in the County right of way. Utility poles and light standards within the road right of way will be addressed by County revocable encroachment permit or franchise agreement (or comparable State permits), rather than the regulations of WCC 20.13.

Utility poles and/or light standards outside of the right-of-way should be treated like any other structure, so potential wireless services on such structures (if allowed by the owner) will not be impeded. Therefore, we are proposing to delete the text above.

(126) Setbacks Applicable. The following setback standards shall apply to personal wireless service communication facilities:

(a) ~~Accessory-Ancillary equipment facilities structures~~ shall comply with the setback requirements for ~~principal nonaccessory structures~~ in the underlying district or be located in a legally established existing structure.

(b) An antenna and its attachment device attached to a building or other permanent structures shall comply with the setback requirements for ~~principal nonaccessory structures~~ in the underlying district. Where the setback requirement in the underlying zone is based on the height of the structure, the height used to compute the setback for the antenna array shall be the height of the structure plus the additional height that will be added by the antenna array and its attachment device.

~~(c)~~ Freestanding wireless communication support structures located in a residential related district as described in WCC 20.13.085 shall be set back from any property line by a distance equal to the height of the wireless communications support structure or the setback of the underlying use district, whichever is greater.

(d) Freestanding wireless communication support structures located in other than residential related districts shall be set back from any property line abutting or adjacent to a residential related district a distance equal to the height of the wireless

communications support structure or the setback of the underlying use district, whichever is greater.

(~~g~~d) Regardless of the district, freestanding wireless communication support structures shall be set back from dwellings not on the same legal lot, a distance equal to the height of the freestanding wireless communication support structure or the setback of the underlying use district whichever is greater.

(~~f~~e) Setbacks for freestanding wireless communication support structures shall be measured from the ground level base of the structure.

(~~g~~f) The setback requirements for freestanding and attached wireless communication facilities under WCC 20.13~~this chapter~~ may be reduced by the approving authority subject to the satisfaction of the special exception criteria in WCC 20.13.110.

(~~137~~) In the event that a new freestanding or attached wireless communication facility is proposed on land zoned agriculture or in an agriculture overlay zone and the land is otherwise suitable for agricultural use, the facility shall be located and maintained so as not to interfere with current agricultural activities or the potential future use of the site for agricultural activities.

(~~148~~) Screening Standards. Freestanding and attached wireless communication facilities shall be subject to the following standards for visual screening:

(a) The perimeter of the wireless communication support structure and any guyed wires and anchors shall be enclosed by a fence or wall at least six feet in height. A row of evergreen shrubs, spaced not more than five feet apart and capable of growing to form a continuous hedge at least five feet high within five years of planting, and at least one row of evergreen trees or shrubs spaced not more than 10 feet apart nor less than six feet high when planted shall be installed outside and adjacent to the fence.

(b) Landscape material used for screening should be selected and sited to produce a hardy and drought-resistant landscape area. Native plant materials are preferred.

(c) Maintenance of landscaped areas shall be the responsibility of the applicant and/or operator of the facility. Required landscaping must be maintained in a healthy manner. Trees and shrubs that die must be replaced with healthy in-kind materials such that during the life of the facility the landscaping continues to satisfy the requirements of the permit. Temporary irrigation shall be provided to help ensure survival during the plant establishment period. If the approving authority determined that existing vegetation provided adequate screening without the need for additional landscaping, then no action shall be taken by the applicant or his assigns or successors that would diminish its effectiveness in screening the site. In the event that natural vegetation is removed to the extent that the area required to be screened is made more visible, the operator of

the facility shall prepare a revegetation plan and submit the plan to the administrator for review and approval. Upon approval, the operator shall implement the plan.

(d) The administrator or the hearing examiner as appropriate may approve any combination of existing vegetation, topography, walls, decorative fences or other features instead of landscaping, if they achieve the same degree of screening as the required landscaping. Either, as appropriate, may waive the requirement for the installation of screening for those sides of the facility that are naturally screened so as not to be visible from public streets or adjoining properties.

(e) Existing vegetation shall be preserved to the maximum extent practicable.

(f) When landscaping is required to be installed a maintenance bond, assignment of funds or other financial guaranty acceptable to the county shall be provided in the amount of 50 percent of the value of the labor and materials. The guaranty shall be in effect for two years from the date of planting.

(159) General Height Standards. The following standards shall apply to wireless communications facilities:

(a) The height of a freestanding or attached wireless communication facility shall be measured to include the support structure and any antennas proposed to be attached to the structure at the time of application; provided, that a lightning rod, not to exceed 10 feet, or FAA required lighting shall not be included in the height measurement.

(b) The height limit on a freestanding wireless communications facility shall be the minimum height necessary for the facility to function satisfactorily provided the height does not exceed height restriction imposed elsewhere in this chapter. The applicant shall provide technical documentation that the height proposed is the minimum necessary. As provided in WCC 20.13.160, the administrator or the hearing examiner may require a third party review of this information.

(c) The height of antennas mounted or installed on an attached wireless communication support structure may exceed the height limit of the underlying zone; provided, that the height does not exceed height restriction imposed elsewhere in this chapter.

(1610) Parking. Each freestanding and attached wireless communication support structure shall be provided with at least one adjacent parking space or more if needed to accommodate staff. All unstaffed facilities shall have access to parking for maintenance personnel; however, such parking may be shared or public parking at the discretion of the county. Staffed facilities shall require one parking space per staff member under the standard provisions of the zone in which it is located.

Rationale: Parking space requirements are contained in WCC 20.80.580. These requirements do not address wireless facilities.

(1711) Building and Utility Permits. Approval of a ~~WCF~~ permit pursuant to WCC 20.13 does not exempt or otherwise remove any requirements for obtaining building permits and other applicable construction, development or operation related permits, licenses or approvals for the project. It shall be the permittee's responsibility to secure all other necessary permits and approvals prior to beginning work on the installation of the facility. (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000. Formerly 20.13.060).

**20.13.095 Concealment elements for small and macro wireless facilities.**

Small wireless facilities and macro wireless facilities may be designed with concealment elements. The term "concealment element" means an element that is part of a stealth-designed facility intended to make a structure look like something other than a wireless facility, and is part of the eligible support structure approval. Examples of concealment elements include painting to match the supporting façade and making the structure look like a native tree or flag pole.

The FCC's *Declaratory Ruling and Notice of Proposed Rulemaking* (June 2020) states:

. . . The term "concealment element" in [47 CFR] section 1.6100(b)(7)(v) means an element that is part of a stealth-designed facility intended to make a structure look like something other than a wireless facility, and that was part of a prior approval . . . the *2014 Infrastructure Order* identified parts of a stealth wireless facility such as "painting to match the supporting façade or artificial tree branches" as examples of concealment elements. . . a concealment element must have been part of the facility that was considered by the locality at the original approval of the tower . . . a concealment element. . . would look like something else, such as a pine tree, flag pole, or chimney. . . (pages 8, 18, and 20).

The significance of the term "concealment element" is derived from the federal definition of "eligible facilities request" and the related definition of "substantially change" (incorporated into proposed WCC 20.13.025). In order to qualify as an eligible facilities request the proposal cannot, among other things, defeat the concealment elements of the eligible support structure.

As a related matter, in order to qualify as an eligible facilities request a proposal cannot violate certain conditions associated with approval of the eligible support structure. These "conditions" may include aesthetic conditions to minimize the visual impact of a wireless facility as long as the condition does not prevent modifications explicitly allowed under the eligible facility request provisions (relating to antenna height, antenna width, equipment cabinets, and excavations or deployments outside the current site). There must be express evidence that at the time of approval the local government required the feature and conditioned approval upon its continuing existence. Examples of aesthetic conditions include requiring a specific placement, requiring a shroud, requiring walls or fences, setbacks, or location behind a tree-line (*FCC's Declaratory Ruling and Notice of Proposed Rulemaking*, June 2020, pages 8, 18, 23, and 24).

Therefore, when permitting support structures that eligible facility requests may later be located on, it is useful to distinguish between concealment elements (addressed in proposed WCC 20.13.095) and other aesthetic conditions of approval (addressed in proposed WCC 20.13.120). Furthermore, some aesthetic "conditions associated with siting approval" (i.e. screening) may not be needed if the original tower or support structure is designed with concealment elements.

**20.13.100 Temporary uses.**

Freestanding or attached wireless communication facilities may be permitted as a temporary use with review by the administrator in order to facilitate continuity in personal wireless communication service during repair or maintenance of existing personal wireless service communication facilities, when a supporting structure and site are being redeveloped, or prior to completion of construction of new personal wireless service communication facilities. ~~Such~~ Temporary uses shall operate for not more than ~~60 days at any one location within a six-months period~~ commencing when transmission from such facility begins, provided that the administrator may approve additional one-six-month extensions if the applicant demonstrates that substantial progress has been made on the repair, maintenance, redevelopment, or new construction. Additional extension requests must be submitted before the end of any extension period. Temporary uses shall not be authorized for more than a cumulative total of 24 months. The personal wireless service communication facility(s) shall be removed within 30 days after the facility is no longer needed for telecommunications purposes. (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000. Formerly 20.13.090).

Rationale: In an email dated June 23, 2022, an industry representative stated:

. . . It often takes a more than a year for demolition and redevelopment of a building mount site, especially with the labor shortages in both the construction and local planning/building departments. Verizon would request that the director have discretion to grant more than one 6 month extension if the project is still underway. The telecom carrier waiting to go on the roof has no control over these delays and having to remove a temp facility results in gaps in coverage. . .

The industry representative made similar comments at the June 23, 2022 Planning Commission hearing.

At the request of the Planning Commission, Planning and Development Services staff met on July 6, 2022 to discuss this provision. PDS finds that it is reasonable to allow temporary uses for a longer period of time. We suggest that such uses could qualify for “temporary” status for a maximum of 24 months.

**20.13.105 Noise requirements.**

- (1) Personal wireless service facilities shall comply with state noise level standards under Chapter 173-60 WAC, as amended.
- (2) Generator use is only permitted as a backup power supply for emergency operation purposes or other times when the regular power supply is not available. If generators, air conditioning or other noise generating equipment is proposed, the applicant shall provide information detailing the expected noise level and any proposed abatement measures. This may require noise attenuation devices or other mitigation measures to minimize impacts.

Rationale: Noise requirements have been modified and moved from WCC 20.13.090 (which, under the proposal, only applies to small and macro wireless facilities) to proposed WCC 20.13.105 (which applies to all personal wireless service facilities).

### **20.13.110 Special exceptions for small and macro wireless facilities.**

When adherence to all development standards ~~the requirements of WCC 20.13~~ ~~this chapter would prohibit, have the effect of prohibiting or materially inhibit personal wireless service, including but not limited to resulting~~ in a physical barrier which would block signal reception or transmission or ~~preventing~~ effective communication in all permissible locations, a special exception may be permitted provided criteria outlined below are met. Exceptions do not apply to variations from the current code as adopted and amended per WCC Title 15, Buildings and Construction. A variance pursuant to WCC 22.05.024 ~~Chapter 20.84~~ WCC is required for variations from applicable zoning regulations not contained in WCC 20.13 ~~described in this section.~~

Rationale: 47 US Code 253(a) indicates that “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Additionally, 47 US Code 332(c)(7)(B)(i) states: “The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”

The FCC *Declaratory Ruling and Third Report and Order in the matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (adopted September 26, 2018) indicates:

. . . a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially inhibits the provision of such services. We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider’s ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities. . . a state or local legal requirement could materially inhibit service in numerous ways—not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services. Thus, an effective prohibition includes materially inhibiting additional services or improving existing services. . . (paragraph 37).

An industry representative requested that the “materially inhibit” language be inserted in the Special Exception section of the code.



The approval authority for granting of the special exception shall be the same as that of the authority authorized to approve the permit for the personal wireless service facilities antenna location. A request for a special exception shall be processed in conjunction with the permit approving the antenna location.

Rationale: A special exception may be requested for the whole wireless facility, not just the antenna.

~~Upon review of special exception requests, the approval authority shall consider first those standards having the least effect upon the resulting aesthetic compatibility of the antenna or tower with the surrounding environment. The approval authority shall review setback, size, screening requirements, and height limits.~~

Rationale: The special exception approval criteria are listed below and it is unclear what the above text is intended to achieve.

(1) Special Exception Criteria.

(a) The applicant shall justify the request for a special exception by documenting and providing evidence that the full application of a particular standard or standards of WCC 20.13~~this chapter~~ would prohibit, have the effect of prohibiting or materially inhibit personal wireless service, including but not limited to resulting in an obstruction or inability to send and receive a communication signal from the proposed location of the facility and, further, that the obstruction or inability to send or receive a signal from that location is the result of factors beyond the property owner’s or applicant’s control. Pictures, scaled drawings, maps and/or manufacturer’s specifications, and other technical information as necessary should be provided to substantiate the need for the special exception.

(b) The applicant for a special exception shall demonstrate that the proposed materials, shape, and color of the proposed personal wireless service facilities antenna will minimize negative visual impacts on adjacent or nearby residential uses to the greatest extent possible. The use of certain materials, shapes and colors may be required in order to minimize visual impacts.

(c) Any request for a special exception to heights for new antennas that are proposed to be mounted or installed on an attached wireless communication support structure shall be reviewed relative to height limitations set for structures in the underlying zone district in which the antenna is to be located.

(d) Requests for special exceptions for setback reductions shall also be evaluated~~judged~~ based on the following criteria:

(i) The extent to which screening and camouflaging is existing or will be employed to mitigate the effects of the structure versus the effectiveness value of the setback in providing such screening.

(ii) The need for the setback reduction to facilitate a location or design that better satisfies the criteria of this chapter.

(iii) The impact on adjacent properties.

~~(iv) Location in a street right-of-way.~~ (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2013-057 § 1 (Exh. A), 2013; Ord. 2000-006 § 1, 2000).

Rationale: WCC 20.13 does not apply within the street right of way (see proposed WCC 20.13.030(7) and (8)).

(e) A special exception for small wireless facilities shall not be granted that would alter the dimensional, bulk, numerical, or other criteria in the definition of small wireless facilities in WCC 20.13.020.

Rationale: If a proposal does not meet the definition of small wireless facility, it would have to be re-submitted as a macro wireless facility.

**20.13.120 Conditions associated with siting approval.**

The County may impose conditions associated with any permit for a personal wireless service facility in accordance with the WCC. Conditions may require that all activity on site shall be done in accordance with the site plan approved by the County and that any alterations from the approved site plan will require further review by Whatcom County Planning and Development Services and/or the Hearing Examiner. Conditions must be incorporated into the permit in writing. Subsequent eligible facilities requests must comply with conditions associated with permits for construction or modification of the eligible support structure or base station equipment, except as set forth in WCC 20. 13. 025(3) and (7).

Rationale: Pursuant to 47 CFR 1.6100(b)(3) and (7) a proposal will not qualify as an “eligible facilities request” if, among other things, “It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment.” The FCC’s *Declaratory Ruling and Notice of Proposed Rulemaking* (June 2020) states “. . . there must be express evidence that at the time of approval the locality required the feature and conditioned approval upon its continuing existence in order for non-compliance with the condition to disqualify a modification from being an eligible facilities request. . .” (page 22). Therefore, it is important to explicitly set forth conditions associated with the original permit for a small wireless or macro wireless facility so that subsequent eligible facility requests can be evaluated for compliance with these conditions.

**20.13.120 Application and conditions of issuance.**

Applicants shall submit the following information in addition to standard application materials:

(1) A scaled site plan clearly indicating the location of the proposed facility, all other structures and uses on the site, adjacent roadways, proposed means of access, parking, existing and proposed landscaping and setbacks from property lines. Elevation drawings of the proposed tower, the equipment structure, existing structure with proposed antenna, fencing, buffering/screening, type of architectural treatment, and any other feature necessary to show compliance with the applicable standards.

(2) Photo-simulations of the proposed facility from adjacent residential properties, public properties and public rights-of-way.

(3) Legal description and ownership of the parcel.

(4) A valid agreement for collocation on an existing WCF support structure or on an existing building or structure; or a location evaluation study as described in subsection (5) of this section.

(5) For new freestanding support structures, a location evaluation study shall be provided as follows:

(a) A study shall be provided showing that the structure is required for present and future network coverage, that the height requested is the minimum necessary to provide for the function and potential collocated antennas and why the antennas could not be collocated on an existing structure. In residential zones, the applicant shall provide adequate proof that the facility could not be located in a nonresidential zone.

(6) The applicant shall submit a performance bond or other security acceptable to the county, as described in WCC 20.13.130(4), to cover the future costs of removal of the facility.

(7) A report from a licensed professional engineer documenting that:

(a) The support structure is designed for collocation of other antennas (if applicable).

(b) The antenna usage will not interfere with other adjacent or neighboring transmission or reception communications signals.

(c) The wireless communications facility complies with all applicable standards of the FCC for such facilities including EMF emission standards, if applicable.

(8) Proof of license by the FCC, if applicable.

(9) A copy of the findings from the FAA's Aeronautical Study Determination regarding the proposed wireless communication support structure.

(10) A copy of the instrument that establishes the right of the applicant to use the site for the intended purpose as required in WCC 20.13.091(7).

~~(11) If the site is a leased site, a copy of lease agreement which specifies or shows that it does not preclude the site owner from entering into leases on the site with other providers. (Ord. 2017-030 § 1 (Exh. M), 2017; Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000).~~

Rationale: In accordance with proposed amendments to WCC 22.05.050, the County will prepare application forms specifying submittal requirements for wireless communication facilities. These submittal requirements may also be included in the Planning and Development Service Department’s administrative manual.

**20.13.130 General criteria for issuance of permits for small and macro wireless facilities.**

(1) Any applicant for a land use permit (other than a building permit) proposing to install an antenna support structure or mount an antenna on an existing structure shall demonstrate by engineering evidence that:

~~(a) The antenna must be located at the site to satisfy its function in the wireless service provider’s local system. The county may require the applicant to provide feasibility studies which demonstrate that locations on existing structures and/or in higher priority locations have been explored and are not feasible or available.~~

~~(b) The height requested is the minimum height necessary to fulfill the site’s function within the wireless service provider’s system.~~

Rationale: There may be multiple high priority sites available, so it is not necessary to show that the antenna must be located at any one particular site. Additionally, the applicant must address higher priority locations under criterion (2) below.

~~(2) In addition to standard criteria,~~ The authority granting the permit shall find that, unless the facility will be located at the highest priority location as set forth in WCC 20.13.085, the applicant has demonstrated that none of the higher priority locations are available or if one is available it is not a feasible location for the proposed facility, or if feasible is less desirable than the one proposed from the standpoint of minimizing impacts on surrounding land uses.

~~(3) The permit may include requirements which:~~

~~(a) Minimize visual impacts to the greatest extent possible by maximum feasible use of camouflage or screening, including but not limited to fencing, landscaping, strategic placement adjacent to existing buildings or live or simulated vegetation, undergrounding of accessory equipment structures, incorporation of wireless communications support structures, antennas and other appurtenances into the architectural features of existing buildings or structures and by requiring compatibility with key design elements in the surrounding area; for example, use of brick or other material similar to that used in adjacent buildings or structures, incorporation of~~

~~support structures into compatible architectural features such as flag poles, bell towers or cornices, or use of simulated vegetation to camouflage support structures.~~

~~(b) Locate wireless communication facilities so as to minimize the visibility of the facility to residentially zoned land and so as to minimize the obstruction of scenic views from residentially zoned land.~~

~~(c) Require the mounting of the facility on existing buildings or structures, or use of other alternatives with less visual, aesthetic or safety impacts, as an alternative to use of a monopole or lattice tower.~~

Rationale: Conditions of approval are addressed under proposed WCC 20.13.120. Visual impacts are addressed in WCC 20.13.080 (prohibited locations), WCC 20.13.085 (siting priorities), WCC 20.13.090 (design and development standards), and WCC 20.13.095 (concealment elements).

(3) The applicant shall submit documentation that the personal wireless service facilities comply with applicable FCC regulations concerning radio frequency emissions.

Rationale: Federal law, passed by the U.S. Congress, indicates that:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions (47 U.S. Code 332(c)(7)(B)(iv)).

While the federal government preempts regulation of radio frequency emissions, there is nothing that says local government cannot require documentation that a proposed small or macro wireless facility will comply with FCC regulations.

With regard to eligible facilities requests, federal regulations adopted by the FCC state:

. . . a State or local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of this section. A State or local government may not require an applicant to submit any other documentation. . . (47 CFR 1.6100(c)(1)).

Therefore, it appears that the County cannot require the applicant to submit radio frequency emission documentation for eligible facilities requests.

(4) Performance Bond or Other Security Acceptable to the County. The operator of the facility shall obtain and keep in force throughout the time the facility is located on the site a performance bond or other security acceptable to Whatcom County payable to Whatcom County in the amount of 150 percent of the estimated cost of removal as determined by the director, but not less than \$1,000. The

bond is intended to cover the costs of removal of such facility at such time as the facility may be required to be removed pursuant to WCC 20.13.150. (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000).

#### **20.13.140 Federal requirements.**

All wireless communications support structures must meet or exceed applicable current standards and regulations of the FAA, the FCC and any other agency of the federal government with the authority to regulate wireless communication support structures and antennas. If such standards and regulations are changed, owners of the freestanding or attached wireless communication support structure, antennas and electronic equipment governed by this chapter shall bring such facility into compliance with such revised standards and regulations if required by ~~within the compliance schedule of~~ the federal agency. Failure to bring such facilities into compliance with such revised standards and regulations shall constitute grounds for the removal of the facility at the owner's expense. (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000).

#### **20.13.150 Removal of antennas and support structures.**

No less than 30 days prior to the date that a personal wireless service provider plans to abandon or discontinue operation of a facility, the provider must notify the Whatcom County planning and development services director by certified U.S. mail of the proposed date of abandonment or discontinuation of operation. The owner of the facility shall then remove the antenna within 90 days of discontinuation or abandonment unless an additional period of time is authorized by the county. In any case, if the county finds that any wireless communication support structure has not operated for a continuous period of six months, the owner or lessee of the property shall remove the facility within 36 months of receipt of notice to remove from the county. If the abandoned facility is not removed within said time period, the county may remove the antenna or wireless communication support structure at the owner's expense. If there are two or more wireless communications providers on a single wireless communication support structure, this provision shall not become effective until all providers cease using the wireless communication support structure. (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000).

#### **20.13.160 Third party review.**

Personal wireless service providers use various methodologies and analyses, ~~including geographically based computer software,~~ to determine the specific technical parameters of their services ~~and low power mobile radio service facilities,~~ such as expected coverage area, antenna configuration, topographic constraints that affect signal paths, etc. Because of the technical nature of methodologies and analyses, the county may find it necessary to require a third party technical review of the material submitted by the applicant as part of a permitting process. The expert review is intended to address ~~interference and public safety issues and be a site-specific review of technical aspects of the facilities or~~ a review of the provider's methodology and equipment used and not a subjective review of the site which was selected by a provider. Based on the results of the expert review, the county may require changes to the provider's application. The expert review shall address the following:

Rationale: An industry representative recommended removing “interference” in the above text stating:

. . . the Federal Communications Commission has the exclusive authority to regulate radio frequency interference, and local regulations that require a wireless applicant to demonstrate that its facilities will not cause RFI are impliedly preempted by federal law. *New York SMSA Limited Partnership v. Town of Clarkstown*, 612 F.3d 97, 105 (2nd Cir. 2010).

A representative of the Whatcom County Prosecuting Attorney’s Office reviewed this case and stated in an e-mail of January 20, 2022 that frequency regulation is preempted and it is appropriate to remove the word “interference” (in the text above).

- (1) The accuracy and completeness of submissions;
- (2) The applicability of analysis techniques and methodologies;
- (3) The validity of conclusions reached; and
- (4) Any specific technical issues designated by the county.

Rationale: The Planning and Development Services Department makes determinations of completeness without consultant assistance.

In general, and if necessary, the administrator shall consider requiring a third party review of technical information submitted in support of a special exception, and technical information submitted in support of a personal wireless service communication facility proposed at a low priority, high visual impact location.

The selection of a third party expert shall be by mutual agreement between the provider and the county. The cost of the technical review shall be borne by the applicant. (Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000).

**20.13.170 Project permit procedures.**

Project permit procedures including application procedures, permit review time frames, deemed granted provisions (for eligible facilities requests), and appeals are contained in WCC 22.05. Any decision to deny an application shall be in writing, supported by substantial evidence contained in a written record.

Rationale: The language relating to denials has been moved to from WCC 20.13.010 (Purpose), because it fits better under the Project permit procedures section. This language is from 47 US Code Section 332(c)(7)(B)(ii).

20.13.170 Appeals.

The hearing examiner shall have the authority to decide, in conformity with this chapter, appeals from any order, requirement, permit decision or determination made by an administrative official in the administration or enforcement of this chapter where more than one interpretation is possible as provided in WCC 22.05.160. (~~Ord. 2018-032 § 1 (Exh. D), 2018; Ord. 2014-042 § 1 (Att. A), 2014; Ord. 2000-006 § 1, 2000~~).

Rationale: Appeal procedures are set forth in WCC 22.05, Project Permit Procedures.



## EXHIBIT B

*Amend WCC 20.82, Public Utilities, as shown below.*

### **20.82.030 Conditional uses.**

The following uses shall require a conditional use permit or major project permit and shall be subject to a threshold determination in accordance with the Whatcom County SEPA Ordinance:

(1) Transmission pipelines, or pipelines termed a distribution pipeline but having characteristics that fit the definition of a transmission pipeline, carrying petroleum and petroleum products other than natural gas when such pipelines will be located outside the zoning district classified as Heavy Impact Industrial.

(2) Regional transmission pipelines for the bulk conveyance of natural gas, or pipelines termed a distribution pipeline but having characteristics that fit the definition of a transmission pipeline. Except for the above conditions, natural gas pipelines which are owned and operated by a gas utility company regulated by the State Utilities and Transportation Commission and which are distribution lines owned by the utility that provide natural gas service directly to county citizens and businesses shall not be considered regional transmission lines.

(3) New water lines with a nominal pipe size greater than eight inches except for the following, which are permitted outright:

(a) New water lines located and installed by a public utility or municipality within urban growth areas or limited areas of more intensive rural development (LAMIRDs); or

(b) New water lines outside urban growth areas or limited areas of more intensive rural development (LAMIRDs) in conformance with a state approved water comprehensive plan pursuant to RCW 43.20.260 and consistent with the Whatcom County Comprehensive Plan, so long as they are water transmission lines per WCC 20.97.452, or provide service at an intensity historically and typically found in rural areas, per RCW 36.70A.030(17), including but not limited to agricultural uses. Water service for uses or densities not permitted in rural or resource areas shall not be extended or expanded outside urban growth areas or limited areas of more intensive rural development (LAMIRDs), except where necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development, per RCW 36.70A.110(4).

(4) New sewer lines with an inside diameter of six inches or greater and length of 150 feet or greater, except for new sewer lines located and installed within urban growth areas or limited areas of more intensive rural development (LAMIRDs), and in conformance with a state approved sewer and/or water comprehensive plan and consistent with the Whatcom County Comprehensive Plan, which shall be permitted outright. Sewer lines shall not be extended to serve lots outside urban growth areas unless such extensions are shown to be necessary to protect basic public health and safety and the environment, and when such services are financially supportable at rural densities and do not permit

urban development. Sewer lines may pass through areas outside urban growth areas provided they do not provide sewer service to any lot in the nonurban areas.

(5) Electronic communications structures and telecommunication towers including associated maintenance and operations structures, provided this section shall not apply to personal wireless service facilities and associated any structures regulated under WCC 20.13 nor to structures or towers in the public right of way associated with wireless communications facilities.

(6) Water storage reservoirs with volumes exceeding 50,000 gallons, those with height in excess of 12 feet above the ground level measured within 20 feet in all directions of the tank. The following height standards shall apply:

(a) The height limit on the water storage reservoir shall be the minimum necessary to accomplish its intended purpose. The applicant shall provide technical documentation that the height proposed is the minimum necessary.

(b) The height of the water storage reservoir may exceed the height limit of the underlying zone; provided, that all other criteria in WCC 22.05.026 are satisfied.

(7) Utility structures located above ground such as pump stations, equipment buildings and similar structures greater than 200 square feet in area.

(8) Sewer and water treatment plants, except that sewer treatment plants are prohibited in the Airports Operations Zone.

(9) Electrical substations and new electrical power lines operating at voltages greater than 55 kV (55,000 volts); provided, applications for such substations and power lines shall be processed as a major development permit (pursuant to Chapter 20.88 WCC); provided, that no further major development permit shall be granted for such lines which:

(a) Operate at greater than 115 kV (115,000 volts) except on land where such permits have already been granted or in those districts classified as industrial; or

(b) Operate at 115 kV (115,000 volts) and carry greater than 160 mw (160 megawatts) average loading, except on land where such permits have already been granted or in those districts classified as industrial. For purposes of this section, "average loading" means the average power in megawatts carried by a power line over any 12-month period; provided, that loading at full line carrying capacity may not extend beyond any 90-day period;

(c) Are dedicated to provision of transmission service to (from) an electrical generating plant having a generating capacity greater than 160 mw (160 megawatts), except on lands where such permits have already been granted or in those districts classified as industrial.

(10) Electrical substations and new electrical power lines with height in excess of the zoning district's height limitations. The following height standards shall apply:

(a) The height limit on the substation or power line shall be the minimum necessary to accomplish its intended purpose. The applicant shall provide technical documentation that the height proposed is the minimum necessary.

(b) The height of the substation or power line may exceed the height limit of the underlying zone; provided, that all other criteria in WCC 22.05.026 are satisfied. (Ord. 2016-035 § 1 (Exh. A), 2016; Ord. 2016-011 § 1 (Exh. C), 2016; Ord. 2013-028 § 2 Exh. B, 2013; Ord. 2012-032 § 2 Exh. B, 2012; Ord. 2011-013 § 2 Exh. B, 2011; Ord. 2004-041 § 1, 2004; Ord. 2004-014 § 2, 2004; Ord. 2002-017 § 1, 2002; Ord. 2000-006 § 7, 2000; Ord. 99-067, 1999; Ord. 96-056 Att. A § T1, 1996; Ord. 90-124, 1990; Ord. 88-29, 1988; Ord. 87-12, 1987; Ord. 87-11, 1987).

## EXHIBIT C

*Amend WCC 20.83, Nonconforming Uses and Parcels, as shown below.*

### **20.83.020 Expansion of nonconforming use.**

(1) Nonconforming uses may be extended throughout any building partially occupied by such use at the time of passage of the ordinance codified in this section, except for nonconforming adult businesses, which shall not be extended to other parts of the building.

(2) The expansion of a nonconforming use by addition or enlargement shall require a conditional use permit, except for:

(a) ~~Nonconforming adult businesses, which shall not be expanded;~~ and

(b) Personal wireless service facilities regulated under WCC 20.13.070(1-3).

The expansion must be on the parcel as it existed at the time the use became nonconforming and the use shall not expand on adjacent parcel(s). The expansion shall be approved if it is consistent with the applicable zoning regulations except the use restrictions and complies with WCC 22.05.026(3)(b) to (i).

(3) For the purposes of this section, the expansion of a nonconforming surface mining operation (which requires a conditional use permit) shall mean:

(a) Any lateral excavation outside of the footprint of the nonconforming mine as it existed on the effective date of the amendment codified in this subsection; or

(b) Any further excavation within a five-year time of travel boundary for delineated wellhead protection areas (areas within the one-year and two-year time of travel boundaries are included in the five-year time of travel boundary); or

(c) Any further excavation within 10 feet of the seasonal high water table if mining is within a 10-year time of travel boundary for delineated wellhead protection areas, but outside of a five-year time of travel boundary; or

(d) Any further excavation within five feet of the seasonal high water table if mining is within a critical aquifer recharge area, but outside of the 10-year time of travel boundary for delineated wellhead protection areas.

This subsection (3) does not apply to mining operations conducted in accordance with a previously approved conditional use permit, mining operations conducted in accordance with a previously approved county surface mining permit, nor to mining operations within the mineral resource lands overlay zone that have obtained administrative approval. Subsections (3)(b) and (3)(c) of this section do not apply when the well was drilled after the effective date of the amendment codified in this subsection.

(4) Whatcom County shall not pursue enforcement action for failure to possess a conditional use permit against any operator or owner of a nonconforming surface mining operation if all of the following circumstances apply:

(a) The owner or operator demonstrates that this section would require them to cease operations until they obtained a conditional use permit; and

(b) The owner or operator applies for a conditional use permit:

(i) Within 120 days of the effective date of the amendment codified in this subsection; or

(ii) Within 120 days of the date the mine owner or operator is notified of the new wellhead protection area, if the new wellhead protection area is established after the effective date of the amendment codified in this subsection for an existing well; and

(c) The owner or operator continues to actively seek the conditional use permit after the application is submitted. (Ord. 2016-011 § 1 (Exh. J), 2016; Ord. 2001-047 § 1, 2001; Ord. 99-070 § 2, 1999; Ord. 88-29, 1988).

## EXHIBIT D

*Amend WCC 20.97, Definitions, as shown below.*

~~**20.97.302 Personal wireless communications service.**~~

~~“Personal wireless communications service” is a term which means the same as wireless communications service. (Ord. 2000-006 § 5, 2000).~~

Rationale: A definition of “Personal wireless service facility” has been inserted in proposed WCC 20.13.020(19), with the rest of the definitions relating to wireless facilities.

## EXHIBIT E

*Amend WCC 22.05, Project Permit Procedures, as shown below.*

### Chapter 22.05 PROJECT PERMIT PROCEDURES

Sections:

- 22.05.010 Purpose and applicability.
- 22.05.020 Project permit processing table.
- 22.05.024 Variances.
- 22.05.026 Conditional use permits.
- 22.05.028 Administrative approval uses.
- 22.05.030 Consolidated permit review.
- 22.05.040 Pre-application conference.
- 22.05.050 Application and determination of completeness.
- 22.05.060 Vesting.
- 22.05.070 Notice of application.
- 22.05.080 Posting of application.
- 22.05.090 Open record hearings.
- 22.05.100 Consistency review and recommendations.
- 22.05.110 Final decisions – Type I, II, and III applications.
- 22.05.120 Recommendations and final decisions – Type IV applications.
- 22.05.125 Proof of insurance for hazards created in the county.
- 22.05.126 Supplemental procedures for fossil fuel refinery and fossil fuel transshipment facility permitting.
- 22.05.130 Permit review time frames.
- 22.05.140 Expiration of project permits.
- 22.05.150 Permit revocation procedure.
- 22.05.160 Appeals.
- 22.05.170 Annual report.
- 22.05.180 Interpretation, conflict and severability.

**22.05.010 Purpose and applicability.**

(1) The purpose of this chapter is to combine and consolidate the application, review, and approval processes for project permits and appeals as defined in WCC 20.97.321. It is further intended for this chapter to comply with the provisions of Chapter 36.70B RCW and federal laws and regulations relating to personal wireless service facilities (47 US Code Sections 253, 332, and 1455 and 47 CFR Sections 1.6001 through 1.6100). These procedures provide for a consolidated land use permit process and integrate the environmental review process with the procedures for review of land use decisions.

Rationale: Federal laws (US Code) and regulations (Code of Federal Regulations or CFR) preempt certain local governmental authority relating to personal wireless service facilities. Therefore, the County’s project permit procedures must be modified for these facilities.

(2) This chapter applies to the processing of project permit applications for development and appeals related to the provisions of WCC Title 15, Buildings and Construction; WCC Title 16, Environment; WCC Title 17, Flood Damage Prevention; WCC Title 20, Zoning; WCC Title 21, Land Division Regulations; and WCC Title 23, Shoreline Management Program. The provisions of this chapter shall apply to all project permit applications as defined in RCW 36.70B.020, and other administrative decisions, as listed in the table in WCC 22.05.020.

(3) The meaning of words used in this chapter shall be as defined in Chapter 20-97 WCC. (Ord. 2019-013 § 1 (Exh. A); Ord. 2018-032 § 1 (Exh. A)).

**22.05.020 Project permit processing table.**

(1) Marked boxes in the table below indicate the required general steps for processing all project permit applications or administrative actions. The requirements for each step listed in the top row of the table are provided in WCC 22.05.040 through 22.05.160, as indicated. Specific requirements for each project permit can be found through the references given in the table.

Permit Application Processing Table	WCC Reference for Specific Requirements	Pre-Application Required (see 22.05.040)	Determination of Completeness Required (see 22.05.050)	Notice of Application Required (see 22.05.070)	Site Posting Required (see 22.05.080)	Notice of Open Record Hearing Required (see 22.05.090)	Open Record Hearing Held By: (see 22.05.090)	County Decision Maker (see 2.11.210, 22.05.120)	Appeal Body (see 2.11.210, 22.05.160, 23.60.150(H))
<b>Type I Applications (Administrative Decision with No Public Notice or Hearing)</b>									
Boundary Line Adjustment	21.03		✓					Director	Hearing Examiner
Building Permit	15.04	✓ (f)	✓					Director	Hearing Examiner (i)



Permit Application Processing Table	WCC Reference for Specific Requirements	Pre-Application Required (see 22.05.040)	Determination of Completeness Required (see 22.05.050)	Notice of Application Required (see 22.05.070)	Site Posting Required (see 22.05.080)	Notice of Open Record Hearing Required (see 22.05.090)	Open Record Hearing Held By: (see 22.05.090)	County Decision Maker (see 2.11.210, 22.05.120)	Appeal Body (see 2.11.210, 22.05.160, 23.60.150(H))
Natural Resource Assessment	Title 16		✓					Director	Hearing Examiner
Commercial Site Plan Review			✓					Director	Hearing Examiner
Exempt Land Division	21.03		✓					Director	Hearing Examiner
Floodplain Development Permit	Title 17							Director	Hearing Examiner
Land Disturbance Permit	15.04 and 20.80		✓					Director	Hearing Examiner
Lot of Record/Lot Consolidation	20.83 and 20.97.220		✓					Director	Hearing Examiner
Nonconforming Use	20.83		✓					Director	Hearing Examiner
Removal of Development Moratorium	20.80.738(3)								
Shoreline Exemption	23.60	✓ (a)	✓					Director	Hearing Examiner
Zoning Interpretation	22.20							Director	Hearing Examiner
<u>Permitted Personal Wireless Service Facilities</u>	<u>20.13</u>		✓					<u>Director</u>	<u>Court of competent jurisdiction</u>
<b>Type II Applications (Administrative Decision with Public Notice; No Public Hearing)</b>									
<u>Administrative Use</u>	22.05.028	✓	✓	✓	✓			Director	Hearing Examiner
<u>Administrative Use for Personal</u>	20.13		✓	✓	✓			Director	<u>Court of competent jurisdiction</u>

Permit Application Processing Table	WCC Reference for Specific Requirements	Pre-Application Required (see 22.05.040)	Determination of Completeness Required (see 22.05.050)	Notice of Application Required (see 22.05.070)	Site Posting Required (see 22.05.080)	Notice of Open Record Hearing Required (see 22.05.090)	Open Record Hearing Held By: (see 22.05.090)	County Decision Maker (see 2.11.210, 22.05.120)	Appeal Body (see 2.11.210, 22.05.160, 23.60.150(H))	
<u>Wireless Service Facilities</u>										
Lot Consolidation Relief	20.83.070		✓	✓	✓			Director	Hearing Examiner	
Reasonable Use (b)	16.16		✓	✓	✓			Director	Hearing Examiner	
Shoreline Substantial (c)	23.60	✓ (a)	✓	✓	✓			Director (d)	Shorelines Hearings Board (h)	
Shoreline Conditional Use (c)	23.60	✓ (a)	✓	✓	✓			Director (d)	Hearing Examiner	
Zoning or Critical Areas Variance, Minor	22.05.024	✓	✓					Director	Hearing Examiner	
<u>Zoning or Critical Areas Variance, Minor for Personal Wireless Service Facilities</u>	<u>22.05.024</u>		✓					<u>Director</u>	<u>Court of Competent Jurisdiction</u>	
Short Subdivision	21.04	✓	✓	✓	✓			Director	Hearing Examiner	
<b>Type III Applications (Hearing Examiner Decision with Public Notice and Public Hearing)</b>										
Conditional Use	22.05.026	✓	✓	✓	✓	✓		Hearing Examiner	Hearing Examiner	Superior Court
<u>Conditional Use for Personal Wireless Service Facilities</u>	<u>WCC 20.13</u>		✓	✓	✓	✓		<u>Hearing Examiner</u>	<u>Hearing Examiner</u>	<u>Court of Competent Jurisdiction</u>
Floodplain Development Variance	Title 17		✓	✓	✓	✓		Hearing Examiner	Hearing Examiner	Superior Court

Permit Application Processing Table	WCC Reference for Specific Requirements	Pre-Application Required (see 22.05.040)	Determination of Completeness Required (see 22.05.050)	Notice of Application Required (see 22.05.070)	Site Posting Required (see 22.05.080)	Notice of Open Record Hearing Required (see 22.05.090)	Open Record Hearing Held By: (see 22.05.090)	County Decision Maker (see 2.11.210, 22.05.120)	Appeal Body (see 2.11.210, 22.05.160, 23.60.150(H))
Long Subdivision	21.05	✓	✓	✓	✓	✓	Hearing Examiner	Hearing Examiner (g)	Superior Court
Binding Site Plan	21.07	✓	✓	✓	✓	✓	Hearing Examiner	Hearing Examiner (g)	Superior Court
Reasonable Use (e)	16.16	✓	✓	✓	✓	✓	Hearing Examiner	Hearing Examiner	Superior Court
Removal of Development Moratorium	20.80.738(2)		✓	✓	✓	✓	Hearing Examiner	Hearing Examiner	Superior Court
Shoreline Conditional Use	23.60	✓ (a)	✓	✓	✓	✓	Hearing Examiner	Hearing Examiner (d)	Shorelines Hearings Board (h)
Shoreline Substantial	23.60	✓ (a)	✓	✓	✓	✓	Hearing Examiner	Hearing Examiner (d)	Shorelines Hearings Board (h)
Shoreline Variance	23.60	✓ (a)	✓	✓	✓	✓	Hearing Examiner	Hearing Examiner (d)	Shorelines Hearings Board (h)
Zoning or Critical Areas Variance, Major	22.05.024 or 16.16.273	✓	✓	✓	✓	✓	Hearing Examiner	Hearing Examiner	Superior Court
Zoning or Critical Areas Variance, Major For Personal Wireless Service Facilities	22.05.024 or 16.16.273		✓	✓	✓	✓	<u>Hearing Examiner</u>	<u>Hearing Examiner</u>	<u>Court of Competent Jurisdiction</u>
<b>Type IV Applications (County Council Decision with Public Notice and Public Hearing)</b>									
Development Agreement	2.11.205	✓	✓	✓	✓	✓	Hearing Examiner	County Council	Superior Court
Major Project Permit	20.88	✓	✓	✓	✓	✓	Hearing Examiner	County Council	Superior Court
Planned Unit Development	20.85	✓	✓	✓	✓	✓	Hearing Examiner	County Council	Superior Court

Check marks indicate a step is required; reference letters refer to the notes in subsection (2) of this section.

(2) Project Permit Processing Table Notes. As indicated in the table in subsection (1) of this section, project permits are subject to the following additional requirements:

- (a) Pre-application conference subject to WCC Title 23, Shoreline Management Program.
- (b) Single-family residential uses in critical areas or critical area buffers, except all uses in geological hazardous areas and setbacks.
- (c) Shoreline permit public hearing decision determined pursuant to WCC Title 23, Shoreline Management Program. If a public hearing is required the shoreline permit shall be processed as a Type III application.
- (d) Pursuant to Chapters 23.60 and 23.70 WCC, final administrative determinations or decisions as appropriate shall be filed with, or approved by, the Washington State Department of Ecology.
- (e) All uses in geological hazardous areas and setbacks and all non-single-family residential uses in critical areas or critical area buffers.
- (f) Building permit pre-application conference, subject to WCC 15.04.020(A)(3)(a).
- (g) The hearing examiner may choose to consult with the development standards technical advisory committee concerning technical matters relating to land division applications.
- (h) Whatcom County shall consider an appeal of a decision on a shoreline substantial development permit, shoreline variance, or shoreline conditional use only when the applicant waives his/her right to a single appeal to the Shorelines Hearings Board. When an applicant has waived his/her right to a single appeal, such appeals shall be processed in accordance with the appeal procedures of section WCC 23.60.150(H).
- (i) Except that appeals of WCC Title 15 fire and building code requirements shall be made to the board of appeals per current building code, as adopted in WCC 15.04.010. (Ord. 2020-045 § 1 Exh. A; Ord. 2018-032 § 1 (Exh. A)).

Rationale: See proposed amendments to WCC 20.13, personal wireless service facilities, on rationale for status as permitted use (Type I), administrative approval use (Type II), or conditional use (Type III).

#### **22.05.024 Variances.**

(1) Variances from the terms of WCC Title 20 (Zoning) or Chapter 16.16 WCC (Critical Areas) may be authorized in specific cases that will not be contrary to the public interest, and where, due to special conditions, literal enforcement of the provisions of those codes would result in unnecessary hardship.

Generally, variances shall only be considered for dimensional standards, unless otherwise specified in those codes. Under no circumstances shall a variance be granted that allows a use not permissible or otherwise prohibited in the zoning district in which the subject property is located.

(2) There are two types of variances: Minor and Major Variances.

(a) Minor variances include those that are unlikely to have impacts on surrounding properties or people or need to be processed more rapidly to meet federal time frames. These shall be limited to variances for:

(i) A reduction of up to 10 percent of a front yard setback;

(ii) A reduction in parking stall dimensions down to nine feet by 18 feet.

(iii) The following personal wireless service facilities: Small wireless facilities, provided that a variance shall not be granted that would alter the dimensional, bulk, numerical, or other criteria in the definition of small wireless facility in WCC 20.13.

(b) Major variances include all other variances.

(3) The appropriate decision maker, as specified in WCC 22.05.020 (Project permit processing table) shall have the authority to grant variances when the conditions set forth in subsection (4) of this section have been found to exist. In such cases, a variance may be granted so that the spirit of the county's land use codes shall be observed, public safety and welfare secured, and substantial justice done.

(4) Before any variance may be granted, it shall be shown that the following circumstances are found to apply:

(a) That any variance granted shall not constitute a grant of special privilege, be based upon reasons of hardship caused by previous actions of the property owner, nor be granted for pecuniary reasons alone;

(b) Because of special circumstances applicable to the subject property, including size, shape, topography, location, or surrounding, the strict application of WCC Title 20 (Zoning) or Chapter 16.16 WCC (Critical Areas Ordinance) is found to cause a hardship and deprive the subject property of a use or improvement otherwise allowed in its zoning district. Aesthetic considerations or design preferences without reference to restrictions based upon the physical characteristics of the property do not constitute sufficient hardship under this section;

(c) The granting of the variance will not be materially detrimental to the public welfare, or injurious to the property or improvements in the vicinity and zone in which the subject property is situated. (Ord. 2020-045 § 1 Exh. A).

#### **22.05.026 Conditional use permits.**

(1) Application. Conditional use permit applications shall be processed per the provisions of this chapter.

(2) Conditional use permits shall be nontransferable unless said transfer is approved by the hearing examiner.

(3) Approval Criteria. Before approving an application, the director or hearing examiner shall ensure that any specific standards of the zoning district defining the use are fulfilled, and shall find adequate evidence showing that the proposed use at the proposed location:

(a) Will be harmonious and in accordance with the general and specific objectives of Whatcom County's Comprehensive Plan, zoning regulations, and any other applicable regulations.

(b) Will be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity, and that such use will not change the essential character of the same area.

(c) If located in a rural area (as designated in the Comprehensive Plan), will be consistent with rural land use policies as designated in the rural lands element of the Comprehensive Plan.

(d) Will not be hazardous or disturbing to existing or future neighboring uses.

(e) Will be serviced adequately by necessary public facilities such as highways, streets, police and fire protection, drainage structures, refuse disposal, water, sewers, and schools; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services.

(f) Will not create excessive additional requirements at public cost for public facilities and services, and will not be detrimental to the economic welfare of the community.

(g) Will not involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any persons, property, or the general welfare by reasons of excessive production of traffic, noise, smoke, fumes, glare or odors.

(h) Will have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public streets.

(i) Will not result in the destruction, loss or damage of any natural, scenic, or historic feature of major importance.

(4) Approval Criteria for Expansion of Fossil Fuel Refineries Pursuant to WCC 20.68.153 and Expansion of Fossil Fuel Transshipment Facilities Pursuant to WCC 20.68.154. Before approving an application, the hearing examiner shall ensure that any specific standards of the zoning district defining the use are fulfilled, and shall find adequate evidence showing that:

(a) The conditional use permit approval criteria listed under subsection (3) of this section are met;

(b) Within shorelines, if applicable, county approval shall be contingent upon approval of a shoreline permit;

(c) The applicant has documented to the county decision maker (as applicable):

(i) All of the anticipated types and volumes of substances to be processed, stored, or transferred in bulk with the proposed expansion;

(ii) Changes in the maximum transshipment capacity or the maximum atmospheric crude distillation capacity occurring as a result of the proposed expansion, as applicable; and

(iii) The mode of shipment vessels to be loaded or unloaded with the proposed equipment and/or as a result of the proposed expansion.

The permit shall be limited exclusively to those types and volumes of materials or products as documented and approved.

(d) Insurance requirements meet the provisions of WCC 22.05.125.

(e) Mitigation of transportation impacts consistent with Chapter 20.78 WCC, Transportation Concurrency Management, and Chapter 16.24 WCC, Commute Trip Reduction.

(f) Mitigation of impacts to other services including fire and emergency response capabilities, water supply and fire flow, to address risks created by expansions.

(g) Plans for stormwater and wastewater releases have been approved.

(h) Prior to commencement of any site preparation or construction activities, all necessary state leases shall be acquired for any piers or aquatic lands improvements, and it shall be demonstrated to the zoning administrator that the project applicant has met any federal or state permit consultation requirements, including tribal treaty rights or the provisions of the Magnuson Amendment through state and federal permitting decisions.

(i) The county decision maker may approve a conditional use permit with a condition to obtain relevant leases and complete any necessary federal and state permitting requirements, and may restrict the conditional use permittee from undertaking site preparation or construction activities until it has fulfilled that condition.

(j) The permittee must inform the county permitting authorities of a change in the aforementioned disclosures so that the department can document current capacity levels to ensure that the cumulative thresholds under WCC 20.68.153 or 20.68.154 (as applicable) have not been exceeded.

(k) The county decision maker shall include, in any approval of an application for an expansion, as per WCC 20.68.153 or 20.68.154, a condition that the permitted equipment shall only be used in the manner described by the project proponent in the application and approved in the permit.

The application shall describe the intended use, including the type of fuel to be stored and, if located at a fossil fuel refinery or renewable fuel refinery, whether the equipment will or will not be used for transshipment.

(5) Revisions. The hearing examiner may administratively approve revisions to conditional use permits; provided, that the proposed changes are within the scope and intent of the original permit. "Within the scope and intent of the original permit" shall mean the following:

- (a) Lot coverage and height may be increased a maximum of 10 percent from the provisions of the original permit; provided, that:
  - (i) Revisions involving new structures not shown on the original site plan shall require a new permit;
  - (ii) Any revisions shall not exceed height, lot coverage, setback, or any other requirements of the regulations for the area in which the project is located; and
  - (iii) Any revisions shall be reviewed for consistency with the Comprehensive Plan;
- (b) Landscaping may be added to a project without necessitating an application for a new permit; provided, that the landscaping is consistent with conditions (if any) attached to the original permit and is consistent with the regulations for the area in which the project is located;
- (c) The use authorized pursuant to the original permit is not changed;
- (d) No additional over-water construction will be involved for shoreline conditional use permits;
- (e) No substantial increase in adverse environmental impact will be caused by the project revision. (Ord. 2021-046 § 4 (Exh. D); Ord. 2020-045 § 1 Exh. A).

**22.05.028 Administrative approval uses.<sup>1</sup>**

- (1) Administrative approval applications shall be processed per the provisions of this chapter.
- (2) The director of planning and development services is authorized to approve, approve with conditions, or deny all administrative approval use applications.
- (3) Approval Criteria. Decisions for all administrative approval use permits shall be based upon compliance with:
  - (a) The criteria established for the proposed use in the appropriate zone district;
  - (b) The Comprehensive Plan policies governing the associated land use designation;
  - (c) In rural areas, consideration will be given to the cumulative impacts of permitted uses in relation to the governing Comprehensive Plan policies and zoning district; and
  - (d) The criteria of WCC 22.05.026(3) (conditional use permits, approval criteria).
- (e) Additionally, decisions for administrative approval use permits for adult businesses shall be based on the criteria in subsection (4) of this section.



(4) Additional Approval Criteria for Adult Businesses. Prior to granting administrative approval for an adult business, the director shall find that the proposed use at the proposed location satisfies or will satisfy all the following criteria:

(a) The adult business will be consistent with WCC 20.66.131 (Light Impact Industrial District, Administrative approval uses).

(b) The adult business shall be closed from 2:00 a.m. to 10:00 a.m. if it contains:

(i) An adult eating or drinking establishment; or

(ii) An adult theater; or

(iii) Another adult commercial establishment; or

(iv) One or more viewing booths.

(c) If the adult business includes one or more viewing booths, the interior of the adult business will incorporate all of the following measures:

(i) Each viewing booth shall have at least a three-foot-wide opening where a customer enters and exits the booth that is without doors, physical barriers, or visual barriers; and

(ii) Each viewing booth shall have at least one 100-watt light bulb that is properly working and turned on when business is open. The light bulb shall not be covered or otherwise shielded except with a commercially available lighting fixture. A minimum of one 12-inch by 12-inch durable metal sign shall be located at the entrance to each viewing booth area stating that lights shall remain on; and

(iii) Aisles or hallways adjacent to viewing booths shall be a minimum of five feet wide; and

(iv) There shall be no holes or openings in common walls between viewing booths.

(d) Additionally for adult businesses containing one or more viewing booths, a condition of approval shall allow an unannounced inspection by Whatcom County every six months during business hours to ensure that measures in subsections (4)(c)(i) through (iv) of this section are being implemented on an ongoing basis.

(5) Revisions. The director may approve revisions to administrative approval use permits; provided, that the proposed changes are within the scope and intent of the original permit. "Within the scope and intent of the original permit" shall mean the following:

(a) Lot coverage and height may be increased a maximum of 10 percent from the provisions of the original permit; provided, that:

(i) Revisions involving new structures not shown on the original site plan shall require a new permit; and

- (ii) Any revisions shall not exceed height, lot coverage, setback, or any other requirements of the regulations for the area in which the project is located; and
- (iii) Any revisions shall be reviewed for consistency with the Comprehensive Plan;
- (b) Landscaping may be added to a project without necessitating an application for a new permit; provided, that the landscaping is consistent with conditions (if any) attached to the original permit and is consistent with the regulations for the area in which the project is located;
- (c) The use authorized pursuant to the original permit is not changed;
- (d) No additional over-water construction will be involved for shoreline conditional use permits;
- (e) No substantial increase in adverse environmental impact will be caused by the project revision. (Ord. 2020-045 § 1 Exh. A).

#### **22.05.030 Consolidated permit review.**

The county shall integrate and consolidate the review and decision on two or more project permits subject to this chapter that relate to the proposed project action unless the applicant requests otherwise. Consolidated Type I, II, III and IV permits shall be reviewed under the process required for the permit with the highest process type number per WCC 22.05.020. Level IV is considered the highest and Level I is considered the lowest process type. (Ord. 2018-032 § 1 (Exh. A)).

#### **22.05.040 Pre-application conference.**

The purpose of a pre-application conference is to assist applicants in preparing development applications for submittal to the county by identifying applicable regulations and procedures. It is not intended to provide a staff recommendation on future permit decisions. Pre-application review does not constitute acceptance of an application by the county nor does it vest an application, unless otherwise indicated in Whatcom County Code.

- (1) A pre-application conference is required as indicated in WCC 22.05.020, unless the director or designee grants a written waiver. For other permits, the applicant may request a pre-application conference.
- (2) The county shall charge the applicant a fee for a pre-application conference per the unified fee schedule. If the county makes a determination of completeness on a project permit submitted within one year of the notice of site-specific submittal requirements per subsection (6) of this section, the pre-application fee shall be applied to the application cost.
- (3) It is the responsibility of the applicant to initiate a pre-application conference through a written application. The application shall, at a minimum, include all items identified on the pre-application form and the department's administrative manual. The applicant may provide additional information to facilitate more detailed review.

- (4) A pre-application conference shall be scheduled as soon as possible and held no later than 30 calendar days from the date of the applicant's request, unless agreed upon by the applicant and the county.
- (5) The county shall invite the appropriate city to the pre-application meeting if the project is located within that city's urban growth area or which contemplates the use of any city utilities. Notice shall also be given to appropriate public agencies and public utilities, if within 500 feet of the area submitted in the application.
- (6) The county should provide the applicant with notice of site-specific submittal requirements for application no later than 14 calendar days from the date of the conference.
- (7) A new pre-application conference shall be required if an associated project permit application is not filed with the county within one year of the notice of site-specific submittal requirements per subsection (6) of this section or the application is substantially altered, unless waived per WCC 22.05.040(1). (Ord. 2018-032 § 1 (Exh. A)).

#### **22.05.050 Application and determination of completeness.**

(1) Project permit applications shall be submitted using current forms provided by the review authority. The submittal shall include: all applicable fees per Chapter 22.25 WCC, all materials required by the department's administrative manual, and all items identified in the pre-application notice of site-specific submittal requirements, except for personal wireless service facilities which shall be as follows:

- (a) Eligible Facility Requests - The county shall prepare and make publicly available an "Eligible Facilities Request Application" form used to determine whether a proposal qualifies as an eligible facilities request. An applicant's submittal of a completed "Eligible Facilities Request Application" is the first procedural step in the county's application process. The county may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the definition and requirements for an eligible facilities request. The county may not require an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities. The applicant shall submit applicable fees per Chapter 22.25 WCC.
- (b) The county shall prepare and make publicly available a "Small Wireless Facility Application" form used to determine whether a proposal qualifies as a small wireless facility. An applicant's submittal of a completed "Small Wireless Facility Application" is the first procedural step in the county's application process. The applicant shall submit applicable fees per Chapter 22.25 WCC.
- (c) The county shall prepare and make publicly available a "Macro Wireless Facility Application" form for projects that do not qualify as an exempt activity pursuant to WCC

20.13.030, eligible facilities request, or small wireless facility. An applicant’s submittal of a completed “Macro Wireless Facility Application” is the first procedural step in the county’s application process. The applicant shall submit applicable fees per Chapter 22.25 WCC.

Rationale for Eligible Facilities Requests: The FCC’s *Declaratory Ruling and Notice of Proposed Rulemaking* (June 2020) states: “. . . The 60-day shot clock . . . begins to run when an applicant takes the first procedural step in a locality’s application process and submits written documentation showing that a proposed modification is an eligible facilities request . . .” (p. 7). This FCC language makes it important to set forth in local code the “first procedural step” so that it is clear when the 60-day shot clock begins.

47 CFR Section 1.6100(c)(1), relating to eligible facility requests, states:

When an applicant asserts in writing that a request for modification is covered by this section, a State or local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of this section. A State or local government may not require an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities.

Rationale for Small Wireless Facilities and Macro Wireless Facilities: 47 CFR 1.6003(e) states “. . . The shot clock date for a siting application is determined by counting forward, beginning on the day after the date when the application was submitted. . .”

As noted above, the FCC’s *Declaratory Ruling and Notice of Proposed Rulemaking* (June 2020) states, for eligible facility requests, the shot clock “. . . begins to run when an applicant takes the first procedural step in a locality’s application process and submits written documentation showing that a proposed modification is an eligible facilities request . . .” (p. 7). While the FCC’s 2020 Ruling only applies to eligible facility requests, it is presumed that they would take a similar approach for other wireless facilities. In any event, it’s important to set forth in local code when the shot clocks begins for small and macro wireless facilities.

(2) Upon submittal by the applicant, the county will accept the application and note the date of receipt. Receipt of an application does not constitute approval of the project proposal.

(3) ~~Within 14 calendar days of receiving the application,~~ The county shall provide to the applicant a written determination which states either that the application is complete or the application is incomplete within:

- (a) 10 calendar days of receiving a wireless eligible facilities request application;
- (b) 10 calendar days of receiving a small wireless facility application;
- (c) 30 calendar days of receiving a macro wireless facility application; and
- (d) 14 calendar days of receiving all other applications.

To the extent known by the county, other agencies of local, state, or federal government that may have jurisdiction shall be identified on the determination.

Rationale: 47 CFR 1.6003(d)(1) states:

For an initial application to deploy Small Wireless Facilities, if the siting authority notifies the applicant on or before the 10th day after submission that the application is materially incomplete, and clearly and specifically identifies the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information, the shot clock date calculation shall restart at zero on the date on which the applicant submits all the documents and information identified by the siting authority to render the application complete.

The CFR allows a longer period (30 days) for eligible facilities requests for the initial determination of incompleteness. However, because there are tight time frames for reviewing these applications, it is better to quickly make the determination of completeness or incompleteness so the County has more time to process the permit application.

The CFR also allows a longer period (30 days) for macro wireless facilities for the initial determination of incompleteness. Because these facilities are typically larger and the overall time frames for reviewing these applications is longer, it is reasonable to allow the full 30 days for the determination of completeness.

(4) A project permit application (other than for personal wireless service facilities) is complete when it meets the submittal requirements of the department's administrative manual, includes items identified through the pre-application conference process and contains sufficient information to process the application even if additional information will be required. A project permit application for personal wireless service facilities is complete when the application required pursuant to WCC 22.05.050(1) is entirely filled out with the required information, as set forth in the department's administrative manual, and submitted to the county. A determination of completeness shall not preclude the county from requiring additional information or studies at any time prior to permit approval. A project permit application (other than for personal wireless service facilities) shall be deemed complete under this section if the county does not issue a written determination to the applicant that the application is incomplete by the end of the fourteenth calendar day from the date of receipt. A project permit application for personal wireless service facilities is subject to the tolling provisions of WCC 22.05.130 (tolling refers to the time excluded from the permit review time frame).

(5) If the application is determined to be incomplete, the following shall take place:

(a) The county will notify the applicant that the application is incomplete and indicate what is necessary to make the application complete.

(b) The applicant shall have 90 calendar days from the date that the notification was issued to submit the necessary information to the county. If the applicant does not submit the necessary information to the county in writing within the 90-day period, the application shall be rejected. The director or designee may extend this period for an additional 90 calendar days upon written request by the applicant.

(c) Upon receipt of the necessary information, the county shall have 14 calendar days (10 days for personal wireless service facilities) to make a determination and notify the applicant whether the application is complete or what additional information is necessary.

Rationale: For eligible facilities requests, 47 CFR 1.6100(c)(3)(iii) states: "Following a supplemental submission, the State or local government will have 10 days to notify the applicant that the supplemental submission did not provide the information identified in the original notice delineating missing information. . ."

There are also benefits for the County to provide the notification within 10-days for small and macro wireless facilities under 47 CFR 1.6003(d)(3). Specifically, the time it takes the applicant to submit the required information is not counted in the federally mandated time frame for review if the County provides the determination within 10 days.

(6) A determination of an incomplete application is an appealable final administrative determination, subject to WCC 22.05.160(1). (Ord. 2018-032 § 1 (Exh. A)).

**22.05.060 Vesting.**

(1) Complete Applications. For a project permit application the department has determined to be complete per WCC 22.05.050(4), the application shall be considered under the zoning or other land use control ordinances in effect on the date the application was submitted to the department.

(2) Incomplete Applications. For a project permit application the department has determined to be incomplete per WCC 22.05.050(5), the application shall be considered under the zoning or other land use control ordinances in effect on the date the department determines the application to be complete based on the necessary information required by the department.

(3) Applications Subject to Pre-Application Conference. Notwithstanding the provisions of subsections (1) and (2) of this section, for a project permit application that is (a) subject to a pre-application conference per WCC 22.05.020 and 22.05.040, (b) submitted no more than 28 calendar days from the date the department issued its notice of site-specific submittal requirements, and (c) determined complete by the department, the application shall be considered under the zoning or other land use control ordinances in effect on the date the pre-application conference request was submitted to the department.

(4) Continuation of Vesting. Building or land disturbance permit applications that are required to complete a valid (i.e., not expired) project permit approval for project permits identified in the following list (subsections (4)(a) through (m) of this section) shall vest to the zoning and land use control ordinances in effect at the time the project permit application identified below was determined complete:

- (a) Administrative use;
- (b) Commercial site plan review;
- (c) Conditional use;
- (d) Critical areas variance;

- (e) Major project permit;
- (f) Natural resource review;
- (g) Planned unit development;
- (h) Reasonable use (Type II and III);
- (i) Shoreline conditional use permit;
- (j) Shoreline exemption;
- (k) Shoreline substantial;
- (l) Shoreline variance;
- (m) Zoning variance.

(5) Building Permit Applications within Recorded Long and Short Subdivisions and Binding Site Plans. Building permit applications, including associated land disturbance permits, shall be governed by conditions of approval, statutes, and ordinances in effect at the time of final approval pursuant to RCW 58.17.170. Vesting duration for those building permit applications shall be governed by the time limits established for long subdivisions in RCW 58.17.170, unless the county finds that a change in conditions creates a serious threat to the public health or safety.

(6) Building and Fire Code Requirements. Building and fire code provisions adopted per WCC Title 15 vest at the time a building permit application is determined complete.

(7) Duration. Vesting status established through subsections (1) through (5) of this section runs with the application and expires upon denial of the application by the county, withdrawal of the application by the applicant, rejection of the application per WCC 22.05.050(5), expiration of the application per WCC 22.05.130(1)(a)(i), or expiration of the approved permit per WCC 22.05.140. (Ord. 2018-032 § 1 (Exh. A)).

#### **22.05.070 Notice of application.**

(1) For Type II, III, and IV applications per WCC 22.05.020, the county shall issue a notice of application within 14 calendar days of a determination of completeness. The date of notice shall be the date of mailing.

(2) If the county has made a State Environmental Policy Act (SEPA) threshold determination of significance concurrently with the notice of application, the county shall combine the determination of significance and scoping notice with the notice of application.

(3) Notice shall include:

(a) The date of application, the date of determination of completeness for the application, and the date of the notice of application;

(b) A description of the proposed project action and a list of the project permits included in the application, and, if applicable, a list of any studies requested by the county;

(c) The identification of other permits not included in the application to the extent known by the county;

(d) The identification of environmental reviews conducted, including notice of existing environmental documents that evaluate the proposed project (including but not limited to reports, delineations, assessments and/or mitigation plans associated with critical area reviews) and, if not otherwise stated on the document providing notice of application, the location where the application and any studies can be reviewed;

(e) Any other information determined appropriate by the county;

(f) A statement indicating those development regulations that will be used for project mitigation or a determination of consistency if they have been identified at the time of notice;

(g) A statement of the minimum public comment period which shall be 14 calendar days for all project permits except for shoreline substantial development, shoreline conditional use, shoreline variance and major project permits for mitigation banks which shall have a minimum comment period of no more than 30 calendar days;

(h) A statement of the right of any person to comment on the application and receive notice of and participate in any hearings, request a copy of the decision once made and to appeal a decision when allowed by law. The department may accept public comments at any time prior to the close of the open record public hearing, or if there is no public hearing, prior to the decision on the project permit. In addition, the statement shall indicate that any person wishing to receive personal notice of any decisions or hearings must notify the department.

(i) Notices relating to personal wireless service facilities may state the federal preemption of local regulation of radio frequency emissions.

Rationale: Planning Commission – To alert the public to the federal preemption of local government regulation of radio frequency emissions. Council P&D Committee substituted “may” for “shall” on 10/11/2022 (3-0 vote).

(4) The department shall issue a notice of application in the following manner:

(a) The notice shall be published once in the official county newspaper and on the Whatcom County website. The applicant shall bear the responsibility of paying for such notice.

(b) Additional notice shall be given using the following method:

(i) For sites within urban growth areas: Application notice shall be sent to all property owners within 300 feet of the external boundaries of the subject property as shown by the records of the county assessor, except that for personal wireless service facilities, notice shall be sent to all property owners within 1,000’ of the external boundaries of the subject property as shown by the records of the county assessor;



Rationale: Planning Commission – Impacts from personal wireless service facilities are similar regardless of whether the facility is in an urban growth area or not. Council P&D Committee voted to maintain the above language on 10/11/2022 (3-0 vote).

(ii) For sites outside urban growth areas: Application notice shall be sent to all property owners within 1,000 feet of the external boundaries of the subject property as shown by the records of the county assessor.

(5) The county shall send notices of application to neighboring cities and other agencies or tribes that will potentially be affected, either directly or indirectly, by the proposed development. Notice shall also be given to public utilities, if within 500 feet of the area submitted in the application.

(6) All public comments received on the notice of application must be received by the department of planning and development services by 4:30 p.m. on or before the last day of the comment period.

(7) Except for a determination of significance, the county shall not issue its SEPA threshold determination or issue a decision or recommendation on a permit application until the end of the public comment period on the notice of application. If an optional determination of nonsignificance (DNS) process is used, the notice of application and DNS comment period shall be combined.

(8) Public notice given for project permit applications, SEPA documents, project hearings, and appeals hearings as required by this chapter and other provisions of the county code may be combined when practical, where such combined notice will expedite the permit review process, and where provisions applicable to each individual notice are met through the combined notice. (Ord. 2018-032 § 1 (Exh. A)).

#### **22.05.080 Posting of application.**

Where posting of public notice is required per WCC 22.05.020, the department shall post public notices of the proposal on all road frontages of the subject property and adjacent shorelines on or before the notice of application date and shall be visible to adjacent property owners and to passing motorists. Said notices shall remain in place until three days after the comment period closes. (Ord. 2018-032 § 1 (Exh. A)).

#### **22.05.090 Open record hearings.**

As shown in WCC 22.05.020 (Project permit processing table), Type III and Type IV applications and appeals of some Type I and Type II applications require an open record public hearing before the hearing examiner. These hearings are subject to the following:

Rationale: Appeals of personal wireless service facilities are filed with a court of competent jurisdiction, rather than the hearing examiner, under the subject proposal.

(1) Open Record Hearing Notice.

(a) The hearing examiner shall publish a notice of open record hearing once in the official county newspaper and on the Whatcom County website at least 14 calendar days prior to the hearing. The notice shall consist of the date, time, place, and type of the hearing. In addition, personal notice shall be provided to any person who has requested such notice in a timely manner, consistent with WCC 22.05.070(3)(h).

(b) Within two days of the published notice the applicant shall be responsible for posting three copies of the notice in a conspicuous manner on the property upon which the use is proposed. Notices shall be provided by the hearing examiner.

(c) An affidavit verifying distribution of the notice must be submitted to the hearing examiner two working days prior to the open record hearing.

(d) The hearing examiner shall send notice of an open record hearing to neighboring cities and other agencies or tribes that will potentially be affected, either directly or indirectly by the proposed development. The hearing examiner shall be responsible for such notification.

(e) The applicant shall pay all costs associated with providing notice.

(2) One Open Record Hearing. A project proposal subject to this chapter shall be provided with no more than one open record hearing and one closed record hearing pursuant to Chapter 36.70B RCW. This restriction does not apply to an appeal of a determination of significance as provided in RCW 43.21C.075.

(3) Combined County and Agency Hearing. Unless otherwise requested by an applicant, the county shall allow an open record hearing to be combined with a hearing that may be necessary by another local, state, regional, federal or other agency for the same project if the joint hearing can be held within the time periods specified in Chapter 22.05 WCC, or if the applicant agrees to waive such time periods in the event additional time is needed in order to combine the hearings. The combined hearing shall be conducted in Whatcom County pursuant to Chapter 36.70B RCW.

(4) Quasi-judicial actions, including applications listed as Type III and IV applications in WCC 22.05.020, are subject to the appearance of fairness doctrine, Chapter 42.36 RCW. The hearing examiner shall administer the open record hearing and issue decisions or recommendations in accordance with Chapter 42.36 RCW. (Ord. 2020-045 § 1 Exh. A; Ord. 2018-032 § 1 (Exh. A)).

**22.05.100 Consistency review and recommendations.**

During project permit review, the review authority shall determine if the project proposal is consistent with the county's comprehensive plan, other adopted plans, existing regulations and development standards.

(1) For Type I and II applications, the conclusions of a consistency determination made under this section shall be documented in the project permit decision.

(2) For Type III and IV applications the department shall prepare a staff report on the proposed development or action. Staff shall file one consolidated report with the hearing examiner at least 10 calendar days prior to the scheduled open record hearing. The staff report shall:

(a) Summarize the comments and recommendations of county departments, affected agencies, special districts and public comments received within the 14-day or 30-day comment period as established in WCC 22.05.070(6).

(b) Provide an evaluation of the project proposal for consistency as indicated in this section.

(c) Include recommended findings, conclusions, and actions regarding the proposal.

(3) For all project permit applications except for personal wireless service facilities applications, if more information is required to determine consistency at any time in review of the application, the department may issue a notice of additional requirements. The notice of additional requirements shall allow the applicant 180 calendar days from the date of issuance to submit all required information. The director or designee may extend this period for no more than cumulative 24 months upon written request by the applicant, provided the request is submitted before the end of the first 180-day period. A notice of additional requirements is not a final administrative determination. (Ord. 2018-032 § 1 (Exh. A)).

**22.05.110 Final decisions – Type I, II, and III applications.**

(1) The director or designee's final decision on all Type I or II applications shall be in the form of a written determination or permit. The determination or permit may be granted subject to conditions, modifications, or restrictions that are necessary to comply with all applicable codes.

(2) The hearing examiner's final decision on all Type III applications per WCC 22.05.020 or appeals per WCC 22.05.160(1) shall either grant or deny the application or appeal.

(a) The hearing examiner may grant Type III applications subject to conditions, modifications or restrictions that the hearing examiner finds are necessary to make the application compatible with its environment, carry out the objectives and goals of the comprehensive plan, statutes, ordinances and regulations as well as other official policies and objectives of Whatcom County.

(b) Requirements.

(i) Performance bonds or other security, acceptable to the prosecuting attorney, may be required to ensure compliance with the conditions, modifications and restrictions.

(ii) Fossil or renewable fuel refinery or fossil or renewable fuel transshipment facilities: The applicant shall provide insurance or other financial assurance acceptable to the prosecuting attorney consistent with WCC 22.05.125.

(c) The hearing examiner shall render a final decision within 14 calendar days following the conclusion of all testimony and hearings. Each final decision of the hearing examiner shall be in writing and shall include findings and conclusions based on the record to support the decision.

(d) No final decision of the hearing examiner shall be subject to administrative or quasi-judicial review, except as provided herein.

(e) The applicant, any person with standing, or any county department may appeal any final decision of the hearing examiner to superior court, except as otherwise specified in WCC 22.05.020. (Ord. 2021-046 § 4 (Exh. D); Ord. 2019-013 § 1 (Exh. A); Ord. 2018-032 § 1 (Exh. A)).

**22.05.120 Recommendations and final decisions – Type IV applications.**

(1) For Type IV applications per WCC 22.05.020 the hearing examiner's recommendations to the county council may be to grant, grant with conditions or deny an application. The hearing examiner's recommendation may include conditions, modifications or restrictions as may be necessary to make the application compatible with its environment, carry out the objectives and goals of the comprehensive plan, statutes, ordinances and regulations as well as other official policies and objectives of Whatcom County.

(2) Each recommended decision of the hearing examiner for an application identified as a Type IV application per WCC 22.05.020 shall be in writing to the clerk of the county council and shall include findings and conclusions based upon the record to support the decision. Such findings and conclusions shall also set forth the manner in which the decision carries out and conforms to the county's comprehensive plan and complies with the applicable statutes, ordinances or regulations.

(3) The deliberation of the county council on quasi-judicial actions shall be in accordance with WCC 22.05.090(4) and Chapter 42.36 RCW.

(4) For planned unit developments and major project permits the following shall apply:

(a) The recommendation of the hearing examiner regarding planned unit developments and major project permits shall be based upon the criteria set forth in WCC 20.85.335 and 20.88.130, respectively.

(b) The hearing examiner shall file the recommendation with the clerk of the county council within 21 calendar days following the conclusion of the open record hearing.

(c) The county council shall conduct the following within the specified time frames, except as provided in subsection (4)(c)(iii) of this section:

(i) Hold a public meeting, not an open record public hearing, to deliberate on the project application within 28 calendar days after receiving the hearing examiner's recommendation.

(ii) Issue a final written decision within 21 calendar days of the public meeting.

(iii) The county council may exceed the time limits in subsection (4)(c)(i) or (ii) of this section if the county council meeting schedule does not accommodate a meeting within the above time frames, or if the county council makes written findings that a specified amount of additional time is needed to process a specific application or project type, per RCW 36.70B.080(1).

(5) The county council's final written decision may include conditions when the project is approved and shall state the findings of fact upon which the decision is based.

(a) Performance bonds or other security, acceptable to the prosecuting attorney, may be required to ensure compliance with the conditions, modifications and restrictions.

(b) Fossil or renewable fuel refinery or fossil or renewable fuel transshipment facilities: The applicant shall provide insurance or other financial assurance acceptable to the prosecuting attorney consistent with WCC 22.05.125.

(6) Any deliberation or decision of the county council shall be based solely upon consideration of the record established by the hearing examiner, the recommendations of the hearing examiner and the criteria set forth in applicable county code, the county Comprehensive Plan if applicable, and the county Shoreline Management Program, including compliance with SEPA, Chapter 197-11 WAC (SEPA Rules) as adopted and modified in the county code, and the county's adopted SEPA policies. (Ord. 2021-046 § 4 (Exh. D); Ord. 2018-032 § 1 (Exh. A)).

#### **22.05.125 Proof of insurance for hazards created in the county.**

For expansion projects requiring approval under a conditional use permit or major project permit at new or existing facilities per WCC 20.68.153 or 20.68.154, financial assurance for the benefit of Whatcom County shall be required. For such expansion projects, a permittee must demonstrate proof of financial assurance (such as trust funds, letters of credit, insurance, self-insurance, financial tests, corporate guarantees, payment bonds, or performance bonds) sufficient to comply with the financial responsibility requirements set forth in state and federal law, as applicable, prior to permit approval by a Whatcom County decision maker. If the financial assurance is in the form of insurance policies, the policies must name Whatcom County as an additional insured and provide Whatcom County with a certificate of insurance to that effect.

The permittee must maintain the approved level of financial assurance coverage for new or expanded uses while operating the permitted facility. At the request of the permittee, the Whatcom County decision maker may approve new or altered forms of financial assurance to meet the requirements of

this section; provided, that the new or altered form is consistent with the scope and intent of the original permit condition. (Ord. 2021-046 § 4 (Exh. D)).

**22.05.126 Supplemental procedures for fossil fuel refinery and fossil fuel transshipment facility permitting.**

(1) Upon request of the county, fossil fuel refineries or fossil fuel transshipment facilities shall fill out a supplemental checklist for the purpose of determining whether a project qualifies as a permitted use or requires a conditional use permit as specified in WCC 20.68.153 or 20.68.154. The checklist shall contain supplemental information to include:

- (a) Impact on maximum atmospheric crude distillation capacity (MACDC), maximum transshipment capacity, and fossil fuel unit train shipment frequency from the proposed activity;
- (b) Confirmation of the acceptance of potential permit conditions as outlined in WCC 20.68.068(23);
- (c) Applicant name, property owner information, and parcel information as appropriate; and
- (d) An attestation by the applicant regarding the accuracy of the information contained therein, signed by the applicant and certified by a notary public.

(2) Confidential Business Information.

(a) For the purpose of checklists, permit applications and all other materials submitted by fossil fuel refineries or fossil fuel transshipment facilities for activities in the Cherry Point Heavy Impact Industrial District, the following shall apply:

(i) The applicant shall clearly identify information the applicant considers to be confidential business information, not subject to disclosure under Chapter 42.56 RCW (Public Records Act) and/or WCC 1.32.090. If such information is contained in submittal documents, the applicant shall submit two copies of materials for county use as follows:

(A) A copy with confidential business information clearly identified, with a watermark indicating the document contains such information; and

(B) A copy with confidential business information redacted, and a watermark added indicating that the document does not contain such information and is suitable for public disclosure.

(ii) Confidential business information may include:

(A) Processing equipment technical specifications on internals, sidestream/pumparounds, design specifications, and process controls;

(B) Process unit design, instrumentation and controls;

(C) Feedstock, product, or process unit pump capacity and configuration; and

(D) Contractual agreements and all terms contained therein.

(iii) The information listed above is not meant to be all-inclusive. Other information related to the applicant's processing activities, feedstock and product purchase, and/or sale and transportation methods and costs may be confidential business information and, if so, shall be marked as such when submitted.

(iv) Calculation and permit material submittals may contain, but are not required to contain any of the above information.

(v) Where no increase to MACDC, maximum transshipment capacity, or unit train frequency is proposed, submittal of confidential business information specifically related to the criteria of WCC 20.68.153 and 20.68.154 shall not be required to be submitted with the permit application materials.

(3) Where calculations are to be submitted for maximum transshipment capacity of maximum atmospheric crude distillation capacity, the applicant shall provide calculations performed and certified by a professional engineer licensed in the state of Washington, clearly indicating the impact on MACDC and transshipment capacity. Confidential business information shall be clearly identified as required by subsection (2)(a)(i) of this section.

(4) If the county receives a public records request for records containing information the applicant has clearly indicated to be confidential business information pursuant to subsection (2)(a)(i) of this section, the county will notify the applicant of the request and provide the applicant with a reasonable period of time of at least 15 days to file for an injunction under RCW 42.56.540 to prevent the disclosure of such information. If the applicant does not file for an injunction within the period of time set by the county, the county will disclose the records containing the information that the applicant has designated as confidential business information pursuant to subsection (2)(a)(i) of this section. (Ord. 2021-046 § 4 (Exh. D)).

#### **22.05.130 Permit review time frames.**

(1) The county shall issue a notice of final decision for all permit types, including procedures for administrative appeal and notice that affected property owners may request a change in valuation for property tax purposes, to the applicant, the Whatcom County assessor, and any person who requested notice or submitted substantive comments on the application within 120 calendar days of the date the department determined the application complete, except as provided below:

(a) The following time periods shall be excluded from the calculation of the number of days elapsed:

(i) Any period during which the applicant has been required by the county to correct plans, perform required studies, or provide additional, required information through a notice of additional requirements, per WCC 22.05.100(3). The period shall be calculated

from the date the county issues a notice of additional requirements until the date the county receives all of the requested additional information;

(ii) Any period during which an environmental impact statement is being prepared following a determination of significance pursuant to Chapter 43.21C RCW and WCC Title 16;

(iii) The period specified for administrative appeals of project permits as provided in Chapter 2.11 WCC;

(iv) The period specified for administrative appeals of development standards as provided in WCC 12.08.035(l);

(v) Any period in which the applicant has not met public notification requirements;

(vi) Any period of time mutually agreed upon in writing by the applicant and the county.

(b) The time limits established by this section shall not apply to a project permit application that:

(i) Requires an amendment to the Whatcom County comprehensive plan or a development regulation in order to obtain approval.

(ii) Requires approval of a new fully contained community as provided in RCW 36.70A.350, a master planned resort as provided in RCW 36.70A.360, or the siting of an essential public facility as provided in RCW 36.70A.200.

(iii) Is substantially revised by the applicant, including all redesigns of proposed land divisions, in which case a new time period shall start from the date at which the revised project application is determined to be complete.

(c) The county may extend notice of final decision on the project if the county can document legitimate reasons for such a delay. In such a case the county shall provide written notice to the applicant at least 14 calendar days prior to the deadline for the original notice of final decision. The notice shall include a statement of reasons why the time limits have not been met and a date of issuance of a notice of final decision.

(d) Eligible facility requests for personal wireless service facilities shall be subject to the following permit review time frames, tolling, and deemed granted provisions:

(i) An application for an eligible facilities request is reviewed by the county, who will approve the application within 60 days of the date an applicant submits an eligible facilities request application, unless it determines that the proposal does not qualify as an eligible facilities request under WCC 20.13.

(ii) If the county determines that the applicant's request does not qualify as an eligible facilities request, the county shall deny the application within 60 days of



the date an applicant submits an eligible facilities request application. The denial shall be in writing and supported by substantial evidence contained in the written record. If an eligible facilities request application is denied, a new application may be submitted under the appropriate personal wireless service facilities provisions of WCC 20.13.

- (iii) The 60-day review period begins to run when the application is filed and may be tolled only by mutual agreement by the county and the applicant or in cases where the county determines that the application is incomplete. The time frame for review is not tolled by a moratorium on the review of applications.
- (iv) To toll the time frame for incompleteness, the county must provide written notice to the applicant within 30 days of receipt of the application, clearly and specifically delineating all missing documents or information required in the application.
- (v) The time frame for review begins running again when the applicant makes a supplemental submission in response to the county's notice of incompleteness.
- (vi) Following a supplemental submission, the county will notify the applicant within 10 days if the supplemental submission did not provide the information identified in the original notice delineating missing information. The time frame is tolled in the case of second or subsequent notices pursuant to the procedures identified in this section. Second or subsequent notice of incompleteness may not specify missing documents or information that was not delineated in the original notice of incompleteness.
- (vii) In the event the county fails to approve or deny an eligible facilities request within the time frame for review (accounting for any tolling), the request shall be deemed granted if required by federal law or federal regulation. The deemed grant does not become effective until the applicant notifies the county in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted. The applicant shall provide a citation to the federal law or federal regulation that requires the deemed granted status.

*Rationale for Eligible Facility Request Permit Timeframes:* There are several U.S. Code provisions (adopted by Congress) and CFR provisions (adopted by the FCC) that shape the above language:

47 U.S. Code Section 1455(a)(1) indicates 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.”

47 CFR Section 1.6100(c)(2) states “Within 60 days of the date on which an applicant submits a request seeking approval under this section [relating to eligible facilities requests], the State or local government shall approve the application unless it determines that the application is not covered by this section.”

47 U.S. Code Section 332(c)(7)(B)(iii) states “Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.”

The above tolling provisions are from 47 CFR 1.6100(c)(3), with minor changes such as citing the County Code. It should be noted that the proposal requires a determination of completeness or incompleteness within 10 days under WCC22.05.050(3) so that the bulk of the time allowed under federal regulations is available for processing the application. However, for purposes of tolling under federal regulations, the timeframe for processing a permit is tolled if written notice is issued within 30 days pursuant to proposed WCC 22.05.130(d).

Finally, the above “deemed granted” language is based upon 47 CFR 1.6100(c)(4). This federal code preempts local government approval authority if a decision is not rendered on a permit application within the time frame for review set forth in federal regulations. The proposed County Code contains minor changes to the language in the federal code (such as substituting “County” for “State or local government”). Text has also been added that the “deemed granted” status only applies if required by federal law or regulation (if this provision was ever deleted from the federal rules, it would no longer apply in the County Code).

(e) Small wireless facilities shall be subject to the following permit review time frames and tolling periods (collectively known as shot clock periods):

- (i) Review of an application to collocate a small wireless facility using an existing structure: 60 days.
- (ii) Review of an application to deploy a small wireless facility using a new structure: 90 days.
- (iii) Unless a written agreement between the applicant and the county provides otherwise, the tolling period for an application is as set forth below.
- (iv) For an initial application for small wireless facilities, if the county notifies the applicant on or before the 10th day after submission that the application is materially incomplete, and clearly and specifically identifies the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information, the shot clock date calculation shall restart at zero on the date on which the applicant submits all

the documents and information identified by the county to render the application complete.

(v) For resubmitted applications following a notice of deficiency, the tolling period shall be the number of days from the day after the date when the county notifies the applicant in writing that the applicant's supplemental submission was not sufficient to render the application complete and clearly and specifically identifies the missing documents or information that need to be submitted based on the county's original request until the date when the applicant submits all the documents and information identified by the County to render the application complete. The notice pursuant to this section must be issued on or before the 10th day after the date when the applicant makes a supplemental submission in response to the county's written notification.

(vi) The shot clock date for an application is determined by counting forward, beginning on the day after the date when the application was submitted, by the number of calendar days of the shot clock period identified in WCC 22.05.130(1)(e); provided, that if the date calculated in this manner is a federal, state, or local holiday, the shot clock date is the next business day after such date. The term "business day" means any day, except Saturday or Sunday, that is not a legal holiday.

*Rationale for Small Wireless Facilities Permit Timeframes:* 47 US Code Section 332(c)(7) (B)(ii) indicates: "A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a **reasonable period of time** after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request" (bold added for emphasis).

47 CFR Section 1.6003 provides "Presumptively reasonable periods of time" for action, as follows:

- (i) Review of an application to collocate a Small Wireless Facility using an existing structure: 60 days. . .
- (iii) Review of an application to deploy a Small Wireless Facility using a new structure: 90 days. . .

The FCC Declaratory Ruling and Third Report and Order in the matter of *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (adopted September 26, 2018) explain the 60 and 90 day timeframes for processing small wireless facilities:

. . . a shorter, 60-day shot clock for processing collocation applications for Small Wireless Facilities is reasonable . . . collocation applications are generally easier to process than new construction because the community impact is likely to be smaller. In particular, the addition of an antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community. The size of Small Wireless Facilities poses little or no risk of adverse effects on the environment or historic preservation. Indeed, many jurisdictions do not require public hearings for approval of such attachments, underscoring their belief that such attachments do not implicate complex issues requiring a more searching review.

. . . we also find it reasonable to establish a new 90 day Section 332 shot clock for new construction of Small Wireless Facilities. Ninety days is a presumptively reasonable period of time for localities to review such siting applications. Small Wireless Facilities have far less visual and other impact than the facilities we considered in 2009 [i.e. macro facilities], and should accordingly require less time to review. . . (paragraphs 106, 107, and 111 ).

(f) Macro wireless facilities shall be subject to the following permit review time frames and tolling periods (collectively known as shot clock periods):

- (i) Review of an application to collocate a macro wireless facility using an existing structure: 90 days.
- (ii) Review of an application to deploy a macro wireless facility using a new structure: 150 days.
- (iii) Unless a written agreement between the applicant and the county provides otherwise, the tolling period for an application is as set forth below.
- (iv) For an initial application for macro wireless facilities, the tolling period shall be the number of days from: The day after the date when the county notifies the applicant in writing that the application is materially incomplete and clearly and specifically identifies the missing documents or information that the applicant must submit to render the application complete and the specific rule or regulation creating this obligation until the date when the applicant submits all the documents and information identified by the county to render the application complete. The notice pursuant to this section must be issued on or before the 30th day after the date when the application was submitted to toll the review time frame.
- (v) For resubmitted applications following a notice of deficiency, the tolling period shall be the number of days from the day after the date when the county notifies the applicant in writing that the applicant's supplemental submission was not sufficient to render the application complete and clearly and specifically identifies the missing documents or information that need to be submitted based on the county's original request until the date when the applicant submits all the documents and information identified by the county to render the application complete. The notice pursuant to this section must be issued on or before the 10th day after the date when the applicant makes a supplemental submission in response to the county's written notification.
- (vi) The shot clock date for an application is determined by counting forward, beginning on the day after the date when the application was submitted, by the number of calendar days of the shot clock period identified in WCC 22.05.130(1)(f); provided, that if the date calculated in this manner is a federal, state, or local holiday, the shot clock date is the next business day after such date. The term "business day" means any day, except Saturday or Sunday, that is not a legal holiday.

*Rationale for Macro Wireless Facilities Permit Timeframes:* 47 US Code Section 332(c)(7) (B)(ii) indicates:

A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a **reasonable period of time** after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request (bold added for emphasis).

47 CFR Section 1.6003 provides “Presumptively reasonable periods of time” for action, as follows:

- ...
- (ii) Review of an application to collocate a facility other than a Small Wireless Facility using an existing structure: 90 days.
- ...
- (iv) Review of an application to deploy a facility other than a Small Wireless Facility using a new structure: 150 days.

A facility “other than a Small Wireless Facility” is called a “macro wireless facility” in the proposed regulations.

The FCC Declaratory Ruling (adopted November 18, 2009) explains the 90 and 150 day timeframes, still applicable to macro wireless facilities, as follows:

... we consider the nature and scope of the request by defining a shorter timeframe for collocation applications, consistent with record evidence that collocation applications generally are considered at a faster pace than other tower applications. . . (paragraph 42).

The above tolling provisions are from 47 CFR 1.6003(d), with minor changes such as citing the County instead of the “siting authority.”

(2) If an applicant believes a project permit application has not been acted upon by the county in a timely manner or otherwise consistent with this chapter, the applicant or authorized representative may request a meeting with the director to resolve the issue. Within 14 calendar days of the meeting, the director shall:

- (a) Approve the permit if it is within the director’s authority to do so, provided the approval would not violate state or county regulations; or
- (b) Deny the permit if it is within the director’s authority to do so; or
- (c) Respond in writing with the department’s position, or a mutually acceptable resolution of the issue, which may include a partial refund of application fees at the director’s discretion.

(3) Any final order, permit decision or determination issued by Whatcom County shall include a notice to the applicant of his or her appeal rights per WCC 22.05.160. (Ord. 2018-032 § 1 (Exh. A)).

**22.05.140 Expiration of project permits.**

- (1) Project permit approval status shall expire two years from the date of approval except where a different duration of approval is authorized by Whatcom County Code, or is established by a court decision or state law, or executed by a development agreement. The decision maker may extend this period up to one year from the date of original expiration upon written request by the applicant.
- (2) Any complete project permit application for which no information has been submitted in response to the department's notice of additional requirements per WCC 22.05.100(3) shall expire at the end of the time limit established in 22.05.100(3).
- (3) For projects that have received a SEPA determination of significance per Chapter 16.08 WCC, all underlying project permit applications shall expire when one of the following occurs:
  - (a) The applicant has not in good faith maintained a contract with a person or firm to complete the environmental impact statement (EIS) as specified in the scoping document. The applicant is responsible for informing the county of the status of such contract. If there is no notice given to the county, all underlying project permit applications shall expire upon the end date of the contract; or
  - (b) The mutually agreed time frame to complete the draft EIS or final EIS has lapsed.
- (4) Project permits which received preliminary approval or a final decision prior to February 22, 2009, that did not include an expiration time frame in the conditions of approval shall expire on June 16, 2020. (Ord. 2018-032 § 1 (Exh. A)).

**22.05.150 Permit revocation procedure.**

- (1) Upon notification by the director that a substantial violation of the terms and conditions of any previously granted zoning conditional use, shoreline substantial development or shoreline conditional use permit exists, the hearing examiner shall issue a summons as per WCC 2.11.220 to the permit holder requiring said permit holder to appear and show cause why revocation of the permit should not be ordered. Failure of the permit holder to respond may be deemed good cause for revocation.
- (2) Upon issuance of a summons as set forth in subsection (1) of this section, the hearing examiner shall schedule an open record hearing to review the alleged violations. The summons shall include notice of the hearing and shall be sent to the permit holder and the director of planning and development services no less than 12 calendar days prior to the date of the hearing. At the hearing the hearing examiner shall receive evidence of the alleged violations and the responses of the permit holder, as per the business rules of the hearing examiner's office. Testimony shall be limited to that of the division and the permit holder except where additional evidence would be of substantial value in determining if revocation should be ordered. The land use division's evidence may include the testimony of witnesses.
- (3) Upon a showing of violation by a preponderance of the evidence as alleged, the hearing examiner may revoke the permit or allow the permit holder a reasonable period of time to cure the violation. If the violation is not cured within the time set by the hearing examiner, the permit shall be revoked.

Where a time to cure the violation has been set out, no further hearing shall be necessary prior to the revocation. The permit holder shall have the burden of proving that the violation has been cured within the time limit previously set. Such evidence as is necessary to demonstrate that the violation has been cured may be submitted to the hearing examiner by either the permit holder or the director of planning and development services. Any revocation shall be accompanied by written findings of fact and conclusions of law. The permit holder shall be notified of any revocation within 14 calendar days of the revocation. (Ord. 2018-032 § 1 (Exh. A)).

#### **22.05.160 Appeals.**

(1) Any person with standing may appeal any order, final permit decision, or final administrative determination made by the director or designee in the administration or enforcement of any chapter to the hearing examiner, who has the authority to hear and decide such appeals per WCC 2.11.210.

Appeals relating to personal wireless service facilities are filed with a court of competent jurisdiction rather than the hearing examiner.

(a) To be valid, an appeal to the hearing examiner shall be filed, on a form provided by the department, with the department within 14 calendar days of the issuance of a final permit decision and shall be accompanied by a fee as specified in the Unified Fee Schedule. The written appeal shall include:

- (i) The action or decision being appealed and the date it was issued;
- (ii) Facts demonstrating that the person is adversely affected by the decision;
- (iii) A statement identifying each alleged error and the manner in which the decision fails to satisfy the applicable decision criteria;
- (iv) The specific relief requested; and
- (v) Any other information reasonably necessary to make a decision on the appeal.

(b) The hearing examiner shall schedule an open record public hearing on the appeal to be held within 60 calendar days following the department's receipt of the application for appeal unless otherwise agreed upon by the county and the appellant.

(c) A party who fails to appeal within 14 calendar days is barred from appeal, per Chapter 2.11 WCC.

(d) The business rules of the hearing examiner shall govern appeal procedures. The hearing examiner shall have the authority granted in the business rules, and that authority is incorporated herein by reference. See also WCC 2.11.220.

(2) The applicant, any person with standing, or any county department may appeal any final decision of the hearing examiner to superior court or other body as specified by WCC 22.05.020. The appellant shall

file a written notice of appeal within 21 calendar days of the final decision of the hearing examiner, as provided in RCW 36.70C.040. (Ord. 2019-013 § 1 (Exh. A); Ord. 2018-032 § 1 (Exh. A)).

Rationale: With regard to eligible facilities requests, 47 CFR Section 1.6100(c)(5) states “Applicants and reviewing authorities may bring claims related to Section 6409(a) to any court of competent jurisdiction.” Section 6409(a) is part of the Middle Class Tax Relief and Job Creation Act of 2012 (AKA Spectrum Act), addressing these facilities. Section 6409 of this Act, now codified as 47 U.S. Code Section 1455(a)(1), indicates:

... 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.

The County would not have sufficient time to process all required permits and an appeal to the hearing examiner within the 60 day period for reviewing eligible facility requests under federal regulations. Therefore, such appeals will be made to court.

With regard to small wireless facilities and macro wireless facilities, 47 USC 332(c)(7)(B)(v) states:

Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. . .

Small wireless facilities must be processed within 60 to 90 days. Macro wireless facilities approved by the PDS Director must be processed within 90 days (macro facilities on a new structure must be approved within 150 days, but these would require a conditional use permit decided by the hearing examiner). The County would have difficulty processing all required permits and an appeal to the hearing examiner within the 60 to 90 day period for reviewing these facilities under federal regulations.

#### **22.05.170 Annual report.**

Staff shall prepare an annual report on the implementation of this chapter and submit it to the council. (Ord. 2018-032 § 1 (Exh. A)).

#### **22.05.180 Interpretation, conflict and severability.**

(1) Interpret to Protect Public Welfare. In the event of any discrepancies between the requirements established herein and those contained in any other applicable regulation, code or program, the regulations which are more protective of the public health, safety, environment and welfare shall apply.

(2) Severability. The provisions of this chapter are severable. If a section, sentence, clause, or phrase of this title is adjudged by a court of competent jurisdiction to be invalid, the decision shall not affect the remaining portions of this chapter. (Ord. 2018-032 § 1 (Exh. A)).