



Memorandum

September 21, 2022

To: The Honorable Satpal Sidhu, Whatcom County Executive
The Honorable Whatcom County Council

From: Matt Aamot, Senior Planner

Through: Steve Roberge, Assistant Director

RE: Personal Wireless Service Facility Code Amendments (PLN2021-00005)

The U.S. Congress passed the [Telecommunications Act of 1996](#) to "To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." A provision of this law, now codified in [Title 47](#) of the U.S. Code (entitled Telecommunications), 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\(a\)](#)). Additionally, 47 U.S. Code [332\(c\)\(7\)\(B\)\(i\)](#) states that such local regulation ". . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services. . . ." Except as otherwise preempted by federal rules, 47 U.S. Code [332\(c\)\(7\)\(A\)](#) generally preserves local government authority over placement, construction, and modification of personal wireless service facilities.

Congress and the Federal Communications Commission (FCC) have adopted additional rules over the years to address deployment of telecommunication facilities. However, not all of these rules have been incorporated into County Code. Therefore, the Whatcom County Council docketed a project to "Review and update the Zoning Code provisions relating to Wireless Communication Facilities (WCC 20.13) to ensure consistency with Federal rules" (Resolution 2021-007).

The subject proposal substantially modifies the existing County wireless facility regulations. The proposed revisions address three main types of wireless facilities:

- Eligible Facilities Requests;
- Small Wireless Facilities; and
- Macro Wireless Facilities.

Eligible Facilities Requests

The term "eligible facilities request" comes from federal law. Specifically, the U.S. Congress approved the Middle Class Tax Relief and Job Creation Act of 2012 addressing these facilities. Section 6409(a)(1) of this Act, now codified as 47 U.S. Code [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 (italics added).

The following definition is included in 47 U.S. Code 1455(a)(2):

. . . "eligible facilities request" means 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.

The Code of Federal Regulations (CFR), adopted by the FCC, further clarifies what constitutes an eligible facility request by defining "substantial change," in part, as:

. . . A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:

(i) 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 . . .

(ii) 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;

(iii) 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 . . . (47 CFR [1.6100](#)(b)(7)).

The above cited U.S. Code, along with the FCC's implementing regulations, preempts certain local governmental authority by requiring local governments to approve eligible facilities requests (wireless projects that do not create major changes to the built environment). The proposed County Code amendments provide definitions, regulations, and permitting timelines that are consistent with the federal rules.

Small Wireless Facilities

The term “small wireless facilities” comes from the Code of Federal Regulations, adopted by the FCC. These federal regulations define small wireless facilities, in part, as follows:

- (1) The facilities—
 - (i) Are mounted on structures 50 feet or less in height including their antennas . . . ; 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;
- (2) Each antenna associated with the deployment, excluding associated antenna equipment . . . is no more than three cubic feet in volume;
- (3) 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 . . . (47 CFR [1.6002\(I\)](#)).

The proposed County Code amendments provide definitions, regulations, and permitting timelines that are consistent with the federal rules. At the same time, the proposal retains/modifies certain zoning rules that are within the County’s authority, such as siting priorities and design standards.

Macro Wireless Facilities

The term “macro wireless facilities” in the proposed County Code amendments basically includes anything that does not qualify as an eligible facilities request or small wireless facility. A FCC Report and Order in the matter of *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies* (adopted October 17, 2014) states:

. . . We use the term “macrocell” to refer to a high-powered deployment, typically installed relatively high on a tower, to provide signal coverage to a large geographic area . . . Because small cells are smaller and less visible than macrocells, providers can more easily deploy them with stealth measures such as concealment enclosures that blend with the structures on which they are installed . . . (pp. 12 and 16).

Additionally, in distinguishing between macro facilities and small wireless facilities, a 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:

. . . Over the last few years, providers have been increasingly looking to densify their networks with new small cell deployments that have antennas often no larger than a small backpack. From a regulatory perspective, these raise different issues than the construction of large, 200-foot towers that marked the 3G and 4G deployments of the past. . . 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. We expect this trend to increase with next generation networks, as demand continues to grow, and providers deploy 5G service across the nation. . . (pp. 2 and 9).

The proposed County Code amendments provide definitions, regulations, and permitting timelines that are consistent with the federal rules. At the same time, the proposal retains/modifies certain zoning rules that are within the County’s authority, such as siting priorities and design standards.

“Shot Clock” Rules

Federal law requires local governments to process wireless facility permit applications in a timely manner. Specifically, 47 U.S. Code [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.

The Code of Federal Regulations (47 CFR), adopted by the FCC, implements this law by providing the following timeframes for issuing local government permits for wireless facilities (“shot clock” rules). These timelines, along with the proposed County Code permitting requirements, are shown in the table below.

Type	Time for issuing permit	47 CFR Section	County Code Proposal
Eligible Facilities Requests	60 Days	1.6100(c)(2)	Permitted use (building permit only)
Small Wireless Facilities on an existing structure	60 Days	1.6003(c)(1)(i)	Permitted use (building permit only)
Small Wireless Facilities on a new structure	90 Days	1.6003(c)(1)(iii)	Administrative approval use permit + building permit
Macro Wireless Facilities on an existing structure	90 Days	1.6003(c)(1)(ii)	Administrative approval use permit + building permit
Macro Wireless Facilities on a new structure	150 Days	1.6003(c)(1)(iv)	Conditional use permit + building permit

These timelines are integrated into the proposed amendments, as they are all different than the standard 120 day timeframe the County has to process permits under existing WCC 22.05.130(1).

It should be noted that the State Legislature amended the State Environmental Policy Act (SEPA) in 2013 to modify the exemptions for certain wireless facilities ([RCW 43.21C.0384](#)). The State Department of Ecology subsequently amended the “categorical exemptions” in the SEPA Rules to include these wireless facilities ([WAC 197-11-800\(25\)](#)). Exempt activities are not required to submit a SEPA checklist. This rule helps local governments to comply with the shorter permit processing timelines set forth in federal rules.

Planning Commission Recommendations

The Planning Commission made the following changes to the Planning and Development Services (PDS) Department’s proposal:

- **WCC 20.13.010 Purpose** – The Planning Commission recommended adding the following text to the Personal Wireless Service Facilities purpose statement in the County Zoning Code: “. . . Whatcom County recognizes its requirement to provide for communication services and a commitment to the health of its citizens. . . .” (Exhibit A, p. 2).

County PDS Response: No objections.

- **WCC 22.05.020 Project permit processing table** – The Planning Commission recommended that “Type 1” applications for Permitted Personal Wireless Service Facilities require notice of application pursuant to WCC 22.05.070. Type I wireless facilities would require a building permit (but not an administrative approval or conditional use permit).

County PDS Response: The Department has significant concerns relating to this proposed amendment. Type I applications include permitted uses. The County Zoning Code defines “Permitted use” as:

. . . a principal use of a site allowed as a matter of right in conformance to applicable zoning, building and health codes, and not subject to special review or conditions under this ordinance beyond those specifically set forth in zoning district regulations (WCC 20.97.300).

Type I permitted uses contrast with Type II applications (e.g. administrative use permits) and Type III applications (e.g. conditional use permits) where the decision-maker exercises some degree of judgement or discretion in determining whether the approval criteria are met and can condition the permit to address public comments.

No other Type I applications require public notice. In fact, by definition, a Type I application is an “Administrative Decision with No Public Notice or Hearing” (WCC 22.05.020(1)). Requiring notice for these permits would not be consistent with the definition of Type I applications. It would also divert staff time and resources away from other tasks. Notice would have to be mailed to surrounding property owners and published in the newspaper. PDS

would likely get phone calls expressing concerns that PDS cannot address for an outright permitted use. The County would be asking for written comments that it couldn't do anything with (since Type I permits are not discretionary permits and are not conditioned to address public comment). It would give the appearance, and set a false expectation, that PDS is seeking comment and would consider those comments in the decision making process when PDS cannot do so. In reality, public comments have no effect on a Type I permitting process, which is why comments are not sought for Type I permits.

- **WCC 22.05.070 Notice of Application** – The Planning Commission recommended adding language that “Notices relating to personal wireless service facilities shall state the federal preemption of local regulation of radio frequency emissions.”

County PDS Response: The proposed language is essentially a disclaimer indicating that the County cannot regulate radio frequency emissions. This would create a different legal notice requirement for wireless facilities than for other land use applications. It creates additional notice requirements for wireless applications and the potential to miss this self-imposed requirement, resulting in a defective notice. If there is a notice failure, the process of providing proper notice would start all over again. This presents a greater concern for wireless facility applications because of the federal timelines for the local government permitting process. Additionally, providing this information is not legally required. It would simply be a self-imposed notice relating to the lack of County authority to regulate radio frequency emissions from a proposed wireless facility. Therefore, PDS has concerns about the proposed notice requirement.

- **WCC 22.05.070 Notice of Application** – The Planning Commission recommended amending notice requirements as follows:

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;

County PDS Response: The existing County Code requires notice to property owners within 300' for land use applications, such as administrative approval use or conditional use permits, in UGAs. Notice is required to property owners within 1,000' of the site in areas outside of UGAs. The Planning Commission's rationale for this change is that “Impacts from personal wireless service facilities are similar regardless of whether the facility is in an urban growth area or not.” However, this could be said of many land use applications. Additionally, local government does not have regulatory jurisdiction over radio frequency emissions, which is preempted by federal government rules. A 300' notice has been deemed adequate for other land use applications in UGAs. PDS thinks this uniform notice requirement should be maintained in the present case.

Summary

In summary, federal law imposes several requirements on local permitting of wireless facilities. U.S. Code Title 47 has three sections that specifically have a bearing on this proposal, which are briefly summarized below:

- Section 253 – No local regulation may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications service.
- Section 332 – Local regulation shall not prohibit or have the effect of prohibiting the provision of personal wireless services. Additionally, a local government must act on a permit application for personal wireless service facilities within a reasonable period of time.
- Section 1455 - 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.

As mentioned earlier in this memo, the FCC has promulgated more specific rules to implement these federal laws.

The proposed amendments are intended to incorporate these federal requirements into the County Code.

Thank you for your review and consideration of this matter. We look forward to discussing it with you.