



Memorandum

October 8, 2020

To: Planning Commission (October 8, 2020)

From: Chris Kerr, Community Development Director *CK*
Dan Handel, Associate Planner

Subject: Testimony received for Agenda Item 6a: AT&T Cell Tower (CU 2020-02 & VAR 2020-07)

Commissioners:

This memo serves to provide you with public testimony received for the AT&T Cell Tower application package (CU 2020-02 & VAR 2020-07). Note the September 10 letter from Carrie Richter was previously distributed to you; it is included again here for your reference. A paper copy will be available for you if you choose to attend tonight's meeting in-person at City Hall.

Testimony includes:

- 101. Letter from Carrie Richter (submitted 10/8/2020)
- 102. Letter and photo simulations from Sara Springer (submitted 10/7/2020)
- 103. Supplementary photos from Carrie Richter (submitted 9/10/2020)
- 104. Letter from Carrie Richter (submitted 9/10/2020)

October 8, 2020

VIA EMAIL (dan.handel@ci.woodburn.or.us)

Chair Piper and Planning Commissioners
Woodburn City Hall
270 Montgomery Street
Woodburn, Oregon 97071

Re: CU 2020-02 & VAR 2020-07 "AT&T Cell Tower"

Dear Chair Piper and Commissioners:

As you are aware, this firm represents the Simeonovs, residents of a home located less than 200 feet from the proposed monopole and whose sole vehicular and emergency access is the end of Commerce Way. On September 10, I submitted a lengthy letter identifying a number of significant impacts resulting from the proposed use that required denial of the conditional use application. Neither the applicant, nor City staff have made any effort to respond to those concerns in the interim. As a result, this letter will not restate those concerns but rather focus on the newly added variance requests.

Before moving to the variance, I want to direct your attention to the attached photographs taken of the site and its surroundings. As a reminder, Woodburn Development Code (WDC) 5.03.01 requires that the Commission conclude that the proposed tower will not interfere with the aesthetic quality of the environment. Similarly, WDC 2.08.03 requires a finding that the tower will have the "smallest practicable visual impact." As previously explained, the viewpoint photos set forth in the application were self-serving and did not accurately depict the substantial visual impact. Wildfire smoke interfered with our ability to provide the Commission with clear photos before the last hearing. Attached are a few photos taken looking directly to the east from Commerce Way as well as looking to the west from the riparian corridor. These photos illustrate that the environment surrounding this tower feels pastoral with sparse residential settlement and an adjacent city park. The white flag in the photos is atop a 7' pole meaning that the tower will extend an additional 93' above, looming over surrounding residences as well as the city park.

As for the variance request, the applicant seeks waiver of the Commerce Way road improvement standards because they are not roughly proportional to the impacts from the proposed development. Without getting too mired in the details, the US Constitution limits the extent to which a local government may condition a development application to those obligations that are roughly proportional based on the impacts directly caused by that development. Any condition requiring improvements that are not directly tied with and proportional to the impacts of development may not be imposed because they impose a burden that should be borne by the public rather than by the applicant. *Dolan v. City of Tigard*, 512 US 374 (1994).

For background, this is a photo of Commerce Way as it transitions to an undersized gravel roadway where it continues for over half its length before reaching the proposed tower location. This photo is offered to give the Commission a sense of the condition of Commerce Way and illustrate disparity in what the road standards would require.



Compliance with the minimum road dedication and improvement standards that would result in a roadway that matches the improved cross section in the foreground.

In addition to the constitutional limitations, the City has a comprehensive plan policy that requires the City to “balance the costs of City services among all benefited residents and development. Policy G 2.2. Those who benefit from development within the City must be required to pay entirely for the cost. Improvement of the land to operate a tower will require use of an undersized Commerce Road and as a result, the applicant must contribute to offset the impacts of that use.

The starting point in this constitutional analysis requires that the Planning Commission identify what impacts this development will generate based on the application. *Schultz v. City of Grants Pass*, 131 Or App 220, 884 P2d 569 (1994). It is not enough for the applicant to simply allege that compliance with the standard will be unconstitutional. Rather, the initial burden of producing evidence to show the extent of the impacts rests entirely with the applicant. See *Lincoln City Chamber of Comm. v. City of Lincoln City*, 164 Or App 272, 991 P2d 1080 (1999); *McGovern v. Crook County*, 57 Or LUBA 443 (2008).

This application is fraught with inconsistent statements in this regard. The applicant claims that the proposed facility will “cause no impact on public facilities and infrastructure.” Later the applicant claims that the facility will not generate “any measurable increase in daily vehicle trips.” Yet, the application states that the facility will generate “one vehicle trip per month.” This is not “no impact” and it is an impact that is certainly measurable. Even if the impact is found to be an insignificant one trip per month, the City must exact road improvement costs commensurate with that impact, even if it is small.

More important than the application inconsistencies, the applicant has dramatically understated the impact that this application will have on the roadway. As pointed out in our previous letter, construction of this tower will require vehicular use of the roadway that far exceeds one vehicle trip per month. WDC 5.03.03(B)(3) requires consideration of the whole impact of a development on an infrastructure system, including the construction impact. The traffic generation from construction must be taken into account.

This same defect undermines the evaluation of the variance criteria as well. The criteria for granting a variance, WDO 5.03.12.B requires a finding that the compliance with the standard will impose “an excessive burden” and “unreasonably impact” the proposed development. Evaluating these criteria require balancing competing interests that are to guide this analysis, which in relevant part, include: (1) whether the hardship relates to the “land or structure” such that denying the request would make the property “unbuildable;” (2) whether the applicant has no control over the circumstances giving rise to the hardship; (3) whether reasonable use of the property can be made without the variance; (4) whether the hardship was created by the person creating the hardship; (5) whether the request will be “materially injurious to adjacent properties”; and (6) whether the variance is the “minimum deviation necessary to make “reasonable economic use of the property.”

The applicant’s response fails to address these factors, responding only with conclusions that are not supported by evidence in the record. With respect to the “excessive burden” criterion, the applicant reverts to the claim that requiring road improvements would not be “roughly proportional” because the proposed use will not generate any “measurable additional impact” and impose an excessive financial burden and undertaking. As explained above, the legal standard is to evaluate “impact” and not just those impacts that are “measurable.” Moreover, the claim of no measurable impact is belied by the level of construction traffic that is not documented, will significantly compromise the safety and condition of the roadway, and for which the City will not seek any remuneration to make repairs. It may well be that the construction traffic, coupled with the one trip per month use of the roadway will not rise to the level of requiring a complete roadway improvement but at the very least, the City needs to quantify this impact and exact whatever funds are necessary to keep the road in good repair after the tower is in place and for long-term maintenance. As of right now, the road maintenance burden is falling entirely on my clients and will continue to do so unless the Planning Commission makes this applicant pay its fair share of these significant costs.

As for the second variance criteria, the applicant argues waiving the road improvements would not “unreasonably impact” adjacent properties because “there will be no measurable difference in the use of Commerce Way, nor the property itself.” First, this response shows an absolute blatant disregard to the significant impacts raised by my client and submitted into the record to date. Second, the testimony reflects that the City does not maintain Commerce Way but rather, my clients do. The Simeonovs add gravel, grade, and maintain the road in order to allow safe passage for their owner personal vehicles and if necessary, emergency access. The applicant is proposing to add significant levels of heavy construction and commercial vehicle traffic regularly during construction and periodically afterward. The applicant has not calculated what that impact will be, how construction might block the single lane, compromising emergency access to the Simeonov residence, or expressed any willingness to cover road maintenance costs. This new use will have measurable impact on the condition of Commerce Way and impact the Simeonovs convenience and safety.

A majority of the hardship factors are directed at evaluating whether the applicant created the hardship and whether denying the variance request would make the property unbuildable. In other words, does this applicant have any alternative that would avoid the variance. As pointed out in my letter dated September 10, the location of the proposed tower, triggering the extensive road improvement requirements, was based solely on the applicant’s preference. The applicant could have chosen to locate its tower on the south side of this parcel, adjacent to the area where adequate road right-of-way width and improvements already exist, nullifying the need for the road improvement variance. Similarly, locating this tower along the southern property line would reduce the significant impacts such as potholes that construction and heavy tower maintenance vehicles will have on a gravel roadway.

In conclusion, the applicant has not presented sufficient evidence to show that construction and operation of a 100’ monopole will have no impact, as necessary to justify granting variances to the various roadway standards. Rather, the evidence suggests that this development will compromise the existing roadway condition, interfere with the Simeonovs safe access for their use as well as for emergency access. The selection of the tower location on the far north end of a largely unimproved Commerce Way created the hardship to which this applicant now complains. For these reasons, as well as the reasons set forth in the September 10 letter, this Commission must deny these variance requests, as well as the associated conditional use application.

Please place this letter in the record and provide me with notice of the decision as soon as it is made.

Sincerely,



Carrie A. Richter

CAR:kms
Enclosures

Photos of the cell tower taken from Commerce Way looking east / north east
Images show a white flag atop a 7' pole – Tower will extend 93' above the flag
Pole will tower over the Simeonov residence



Photos taken from the Legion Park looking west
Tower will be plainly visible to those enjoying the park as well as to the residents of Stonehedge Court, the white buildings in the background, when they look to the east.





October 7, 2020

City of Woodburn
Planning Commission
Woodburn City Hall
270 Montgomery Street
Woodburn, OR 97071

TRANSMITTED VIA EMAIL – Dan.Handel@ci.woodburn.or.us

RE: Supplemental Submission to the Record for AT&T's Conditional Use and Variance Applications (CU 2020-02 & VAR 2020-07) for a Wireless Communication Facility at 1414 Commerce Way (SA69 Woodburn Parks)

Dear Commissioners,

I represent New Cingular Wireless PCS, LLC ("AT&T"), the underlying applicant of the conditional use and variance applications (CU 2020-02 & VAR 2020-07) (collectively "AT&T's Applications") for a proposed new wireless communications facility (the "Facility") at 1414 Commerce Way (SA69 Woodburn Parks). This letter and the attached documents are submitted on behalf of applicant AT&T and are intended to supplement and be entered into the record for AT&T's Applications.

1. Supplemental Photo Simulations

Please find attached a supplemental photo simulation document that contains the following additional information:

- An additional "View 5" from a vantage point to the north, looking southwest towards the proposed Facility.
- An additional "View 6" from a vantage point to the southwest, looking northeast towards the proposed Facility.

Two versions of equipment loading are shown for View 5 and View 6—the first shows the full potential loading of the tower (if all three additional collocation arrays are filled) and the second depicts the antennas and equipment as proposed in AT&T's Applications.

2. Additional Alternative Site Analysis—Light Industrial (IL) Parcels

In response to the September 10, 2020 comment letter submitted by Bateman Seidel Miner Blomgren Chellis & Gram, P.C. on behalf of the neighboring property owners George and Eva Simeonov, AT&T

would like to submit the additional alternative site analysis for parcels zoned as Light Industrial (IL) within AT&T's identified search ring:

- Parcel 107726—Directly south of subject parcel. This parcel is owned by the same company as the subject parcel, Don Burlingham Family Corp., and they were not amenable to siting a wireless facility on this parcel.
- Parcel 107723—Next parcel south along Commerce Way. Due to the circulation pattern and the RCWOD, there is insufficient space on this parcel to site a new wireless facility.
- Parcels 107715 and 107718—North of Hardcastle on Commerce Way. The only area available on these parcels is within the Riparian Corridor and Wetland Overlay District (RCWOD) therefore there is insufficient space to meet the city's setback requirements. Additionally, Parcel 107718 is directly adjacent to a residential zone.
- Parcels 512888 and 512913—North and south of Mill Street. These parcels are also owned by the same company as the subject parcel, Don Burlingham Family Corp., and they were not amenable to siting a wireless facility on these parcels. Additionally, both parcels are adjacent to residential zones and there is insufficient space on Parcel 512913 to meet the city's setback requirements.

The proposed location was selected because it is located within AT&T's targeted search ring to best meet AT&T's service objectives, meets the city's use and siting requirements, has the least visual impact on the surrounding residentially zoned areas, and is least intrusive to future development of the subject parcel. It is also important to note that the proposed Facility is a minor development compared with the allowed uses Light Industrial parcels—*i.e.* buildings in the IL zone may have only a 0-5ft side setback from other IL-zoned properties and buildings may be up to 70ft with features up to 100ft.

Thank you for your consideration of AT&T's Application.

Sincerely,



Sara Springer
Attorney
Busch Law Firm, PLLC
Enclosures

cc. Debra Griffin, Smartlink LLC, debra.griffin@smartlinkgroup.com
Sharon Gretch, Smartlink LLC, sharon.gretch@smartlinkgroup.com



Photo Location Map

0' 100' 200' 400'



Visual impact will be affected by location and visibility of observer. This document is for planning and information purposes only and is purely conceptual. This is solely the designers / photographers interpretation of the proposed development.

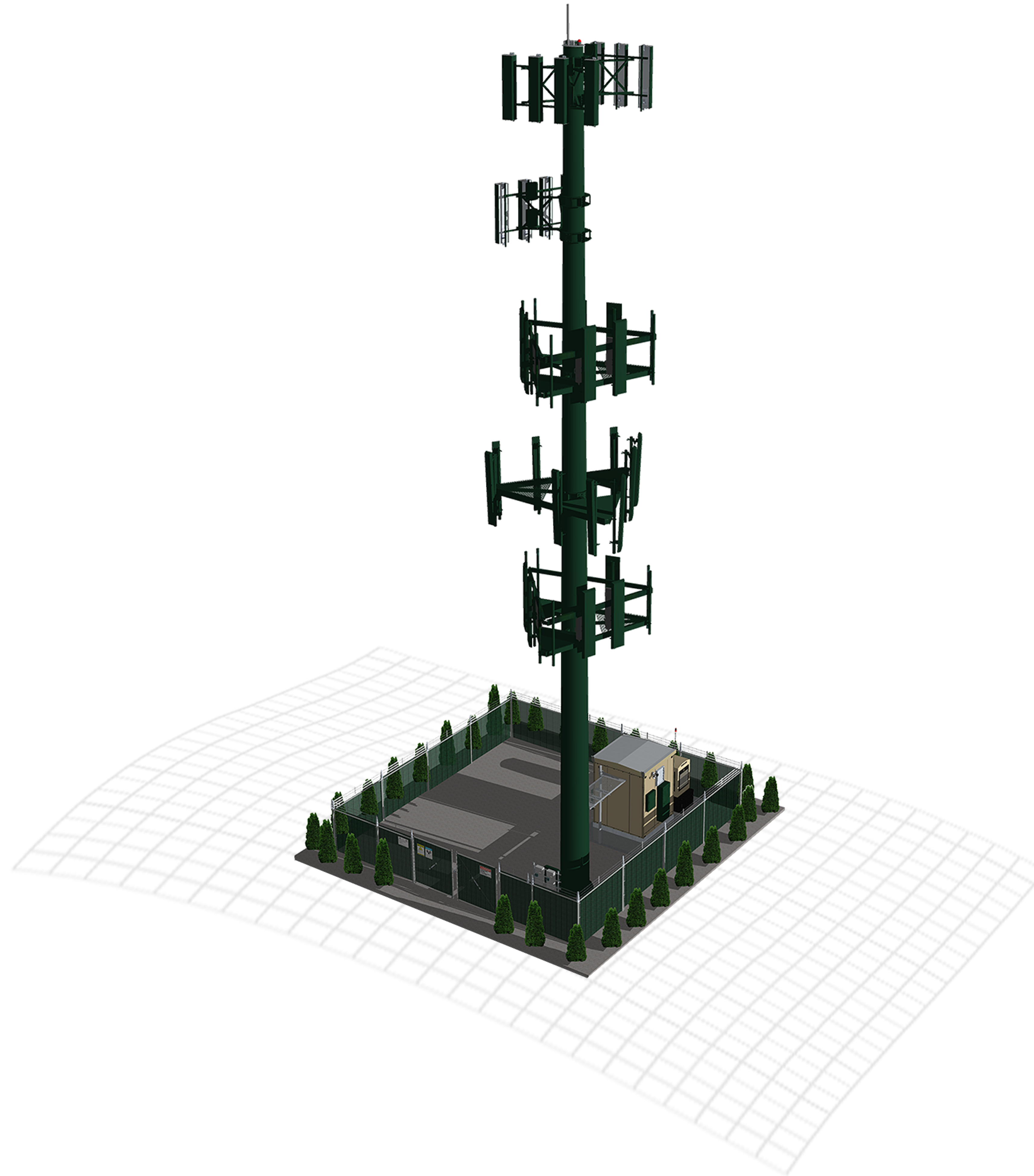


Address: FA #: 14647586 / USID: 280870
TAX LOT: 051W08CB05000
WOODBURN, OR 97071

Woodburn Parks & Rec

SA69

This 3D Model is for planning and information purposes only and is purely conceptual. This is solely the designers interpretation of the proposed development. Landscape species to be approved by governing jurisdiction.



Model



Woodburn Parks & Rec

SA69

Proposed Structure Height: 100.00' AGL
Proposed Antenna Height: 100.00' AGL
Description:
Proposed installation of a telecommunications facility on an existing parcel for AT&T.
Proposed installation of twelve (12) antennas (six current, and six future), twelve (12) RRHs (eight current, four future), two (2) surge protectors, and fiber/dc cables on a new 100' monopole. Proposed installation of a 6'-8" x 6'-8" wic (equipment shelter) and 15kW generator on a 10'-0" x 15'-0" concrete pad within a new 40' x 40' fenced compound.

VIEW 1



Existing Conditions - Looking South



Proposed Conditions - Looking South



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VIEW 2



Existing Conditions - Looking West



Proposed Conditions - Looking West



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VIEW 3



Existing Conditions - Looking North



Proposed Conditions - Looking North



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TAX LOT: 051W08CB05000
WOODBURN, OR 97071

Woodburn Parks & Rec

SA69

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VIEW 4



Existing Conditions - Looking East



Proposed Conditions - Looking East



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VIEW 5



Existing Conditions - Looking Southwest



Proposed Conditions - Looking Southwest



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TAX LOT: 051W08CB05000
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Woodburn Parks & Rec

SA69

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VIEW 5.1



Existing Conditions - Looking Southwest



Proposed Conditions - Looking Southwest



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VIEW 6



Existing Conditions - Looking Northeast

Proposed Conditions - Looking Northeast



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TAX LOT: 051W08CB05000
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VIEW 6.1



Existing Conditions - Looking Northeast



Proposed Conditions - Looking Northeast



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Address: FA #: 14647586 / USID: 280870
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AESTHETIC IMPACT OF PROPOSED TOWER



Picture taken from the sidewalk by the apartments showing the Simeonov home on the left. The blue circle denotes the location of the tower as well as the top of a 10' stick with a white flag. If a 10' stick is visible, imagine the visual impact of a 100' tower in this location.



Picture taken from the from the park showing 10 foot stick to mark approximate tower location

September 10, 2020

VIA EMAIL (dan.handel@ci.woodburn.or.us)

Chair Piper and Planning Commissioners
Woodburn City Hall
270 Montgomery Street
Woodburn, Oregon 97071

Re: CU 2020-02 & EXCP 2020-06 "AT&T Cell Tower"

Dear Chair Piper and Commissioners:

This firm represents George and Eva Simeonov, who own land directly adjacent to where the proposed tower will be located on 1420 Commerce Way. For the past 25 years, the Simeonov family has lived and farmed this parcel, enjoying a bucolic lifestyle surrounded by trees along with the Mill Creek riparian corridor. Their residence is served by a 12-foot wide, one-way gravel road that the Simeonovs have re-graveled and maintained over time, at their own expense. The Simeonovs recently remodeled their house and planned to live there for the next 20 -30 years. Ten days ago, the Simeonovs learned for the first time that all of these plans may be for nothing, if this Planning Commission approves the requested cell tower. Located less than 200 feet from the historic, two-story Simeonov residence, this 100-foot tower will loom over the property, an ugly eyesore that will be plainly visible from inside the home and throughout their property. Further, construction truck and tower maintenance traffic will not only significantly compromise the gravel surface of Commerce Way, its narrow 12-foot width is inadequate to allow two-cars to pass, compromising emergency access.

Cell towers are not permitted outright in Woodburn. Rather, they are conditional uses. This means that they are allowed only where the Planning Commission can find that the proposed use can be "compatible with the surrounding properties." Woodburn Development Code (WDC) 5.03.01. Factors that the Planning Commission must consider when determining if the proposed use is compatible include:

"c. The Impact of the proposed use on the quality of the living environment:

- 1) Noise
- 2) Illumination
- 3) Hours of operation
- 4) Air quality
- 5) Aesthetics and
- 6) Vehicular traffic

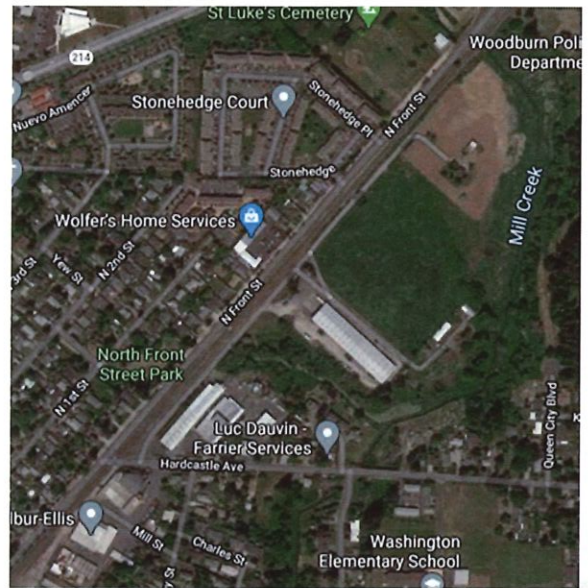
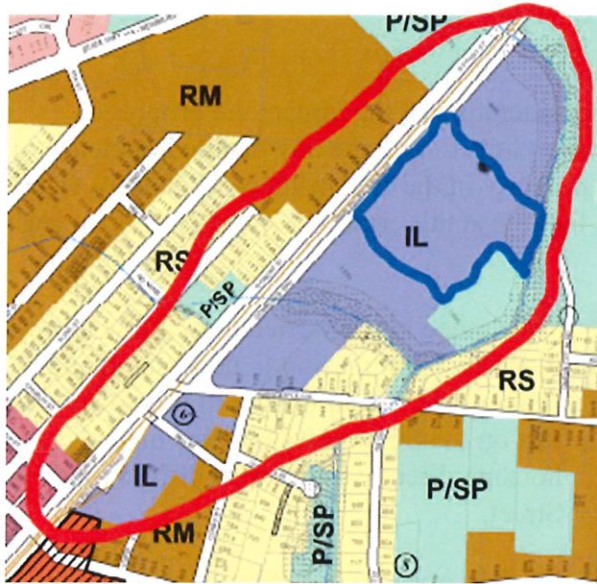
d. The conformance of the proposed use with the applicable Comprehensive Plan policies;" WDC 5.03.01(3)

A parallel provision, WDC 2.08.03(5) provides: "The applicant shall demonstrate that the tower will have the smallest practicable visual impact on the environment, considering technical, engineering, economic and other pertinent factors." This photo, taken September 9, 2020 (it is yellow because of the smoke), illustrates the visual impact that this tower will have on the Simeonov property:



The application and the staff report make no mention of the Simeonov residence, when it is the use most proximate to the proposed cell tower and the most "visually impacted" by this proposal. This omission is significant.

Rather, the staff report focuses on how the location of the tower is good for retaining the development potential of the remainder of the property. The staff report goes on to say that this particular location is required because cell towers are not permitted on any non-industrial zoned land. The problem with this approach is that it fails to acknowledge that there are numerous other industrial-zoned land available to accommodate this tower that will have much less impact and would be "compatible."



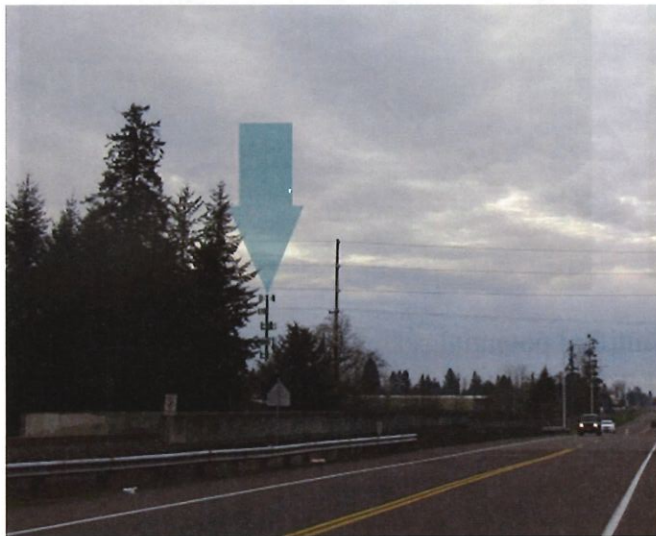
The image on the left shows the applicant's identified potential search ring roughly overlaid atop the zoning map. It illustrates that the applicant was not limited to this particular site but instead had the full length of Commerce Way to select a site. The aerial image of this same area on the right shows substantially more industrial development to the south along Commerce Way that would be "compatible" with an industrial cell tower use. In fact, the applicant, the Don Burlingham Family Corporation ownership, outlined in blue, encompasses two lots. Relocating this tower to the southeast corner of the Burlingham owned parcels, nestled against an existing warehouse building on the south side would be "compatible." Whether on the south side of the Burlingham parcels or within the developed industrial zoned area, adjacent industrial uses would offer the added benefit of placing the use further from the riparian corridor, protect the owner's property for further developability and would limit the impact on the too-narrow, gravel-surfaced Commerce Way. There is no reason why this tower must be located on the northern corner of this expansive property, particularly when it will so significantly impact the Simeonov property.

It is this joint ownership of the two parcels that the applicant claims restricts this owner from placing the tower further to the south, as it would impair the development potential of the two parcels together not just the one. If this larger two-parcel development area is relevant to considering future development potential, these properties must also be considered together for purposes of compatibility and minimizing visual impact. If the additional property is not to be taken into account for future redevelopment purposes, then the tower can be relocated to the south side of the subject property which would again, reduce the visual impact.

It is also significant that cell towers are not permitted uses in residential zones. Although the Simeonov property is not zoned residential, it retains a residence that has existed on this property

since 1891. It makes no sense to disallow cell towers in residential zones but then permit one less than 200 feet from an existing residence.

The criteria for granting a conditional use require consideration of the impact the proposed conditional use will have on aesthetics. The application fails to provide any detailed evidence of the aesthetic impact of this tower on the Simeonov property in the first instance. The only visual impact image offered is taken from N. Front Street looking south, near Mt. Hood Avenue at least .2 miles away from the subject property.



This image is not sufficient to allow the Planning Commission to understand and evaluate the visual impact of this tower, not just on the Simeonovs but also on the housing directly to the west of N. Front Street.

Further, even though this photo is taken from a significant distance away, the monopole is plainly visible. This staff report identified mitigation for these impacts is surrounding the tower by 6-foot arbor vitae and painting the tower green, neither of which are visible from this photo. The identified landscape buffering will not

offer any meaning visual screening from a tower that is 100-feet tall. Even painted green, this tower is plainly visible, standing in stark contrast to its background. This photo of the subject property taken from Commerce Way above illustrates that there is nothing in the natural landscape that will block or otherwise mitigate the visual impact of this tower from the Simeonov property.

There is nothing in the application, or the staff report, to suggest that this applicant made any effort to have “the smallest practicable visual impact” on the Simeonov residence or to mitigate the visual impacts in any respect.

The obligation to ensure compatibility between proposed conditional uses and existing surrounding uses requires the consideration of vehicular impacts. This obligation extends beyond how much traffic this use will generate when operating – claimed to be one trip per month. It also includes construction traffic, which was not considered and must be. The narrow 12-foot road width and its gravel surface condition limits the amount and types of construction trucks that can use the road without compromising its surface. Consideration must also be given to emergency access that could be substantially impaired during construction, if the sole means of ingress and egress is blocked.

Finally, this applicant failed to consider Comprehensive Plan policies directed at protecting residential uses. For example, Policy D-1.2 provides in relevant part: "Zoning ordinances should be strictly enforced to prevent encroachment of degrading non-residential uses." Or Plan Policy D-1.9, which provides: "Industrial and commercial uses that locate adjacent to a residential area should buffer their use by screening, design, and sufficient setback that their location will not adversely affect the residential area." As pointed out above, the buffering proposed by this application will not offer any meaningful screening of the proposed tower.

Finally, as pointed out above, this applicant is not proposing any physical improvements to Commerce Road as part of this application. The minimum standards for a Local Industrial Street depict a 36-foot wide paved, vehicular movement area with 11-feet accommodating a landscape strip and sidewalks on both sides. This applicant does not propose to make any of these improvements and has requested an exception to the street improvement requirements through WDC 5.03.03. Instead, the property owner shall be solely responsible for dedicating 60-feet of right of way sufficient to accommodate the local industrial street when it is built. Staff supports the exception request finding the "low anticipated transportation demand generated by the proposed use" nullifies the need for physical improvements. However, this assumption of low demand is based upon when the use is operating and not during construction. WDC 5.03.03(B)(3) requires considering the "estimated impact, on a quantitative basis, of the building or development on the public infrastructure system..." This impact is not limited solely to its operation phase, nor does it exclude the impacts construction traffic will have on the gravel surface.

WDC 5.03.03(D) closes with a requirement that "deviation from these minimum [improvement] standards may only be considered by a variance procedure." It does not appear that a variance, as required by WDC 5.03.12, was considered as part of this request.

In conclusion, this applicant failed to establish that the proposed cell tower is, or can be made, compatible with the adjacent Simeonov residence. The aesthetic impacts of this tower are immense and yet, these impacts could be entirely mitigated by moving the tower directly onto the property owned by the same fee owner directly to the south or within the existing industrial development along Commerce Way. If relocation is not feasible, the Planning Commission must demand that this applicant address the visual and vehicular impacts of this development on the Simeonov property.

The Planning Commission may not take action on this request at the conclusion of the hearing on this Thursday, September 10. ORS 197.763(3)(f) provides that 10-day mailed notice of an application is sufficient only when the decision-maker intends to hold "two or more evidentiary hearings." Where only one evidentiary hearing is intended, a minimum of 20-days' notice is required. Here, only 10-days' notice was provided. As a result, this hearing must be continued to a date certain and the record left open to allow the Simeonovs adequate time to procure additional evidence and oppose this effort.

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Please place this letter in the record and provide me with notice of the decision as soon as it is made at the address set forth above.

Sincerely,



Carrie A. Richter

CAR:kms
cc: Client