112 Second Street P.O. Box 366 Langley, WA 98260 (360) 221-4246



SCOTT CHAPLIN Mayor

Fax (360) 221-4265

# PLANNING ADVISORY BOARD AGENDA REGULAR MEETING July 6, 2022 @ 4 PM

- VIDEO ONLY via ZOOM -

#### Join Zoom Meeting

https://zoom.us/j/99202993758?pwd=Rlk1Q0xucTNBWDJlcHY4MnJTa1hPUT09

Meeting ID: 992 0299 3758 | Passcode: 789764 | Dial by your location: +1 253 215 8782 US (Tacoma)

Find your local number: https://zoom.us/u/adaKfoHoQR

#### **SPECIAL NOTICE**

**NOTICE IS HEREBY GIVEN** that a quorum of the Langley City Council may be in attendance for the Planning Advisory Board (PAB) meeting on Wednesday, July 6, 2022 at 4pm via zoom. The Council will not be discussing or making any decisions on City business at this meeting.

- 1. CALL TO ORDER
- 2. APPROVAL OF AGENDA
- 3. APPROVAL OF MINUTES
  - a. June 1, 2022 Summary Minutes
- 4. PUBLIC COMMENT Items not on the agenda
- 5. PUBLIC HEARING
  - a. Consider recommendation to the Langley City Council regarding proposed code amendments to section 18.01.040 of the Langley Municipal Code, definitions; repealing section 18.22.190 of the Langley Municipal Code, wireless communications facilities; adopting a new Chapter 18.23 of the Langley Municipal Code related to wireless communications facilities; providing for severability; and establishing an effective date. Attachments: Planning Advisory Board Findings of Fact and Exhibit A, Proposed Changes to Wireless Communications Facilities Ordinance

#### 6. DISCUSSION

 Discussion on draft ordinance to amend Chapters 13.01 and 13.50 of the Langley Municipal Code Addressing Waivers of Utility Participation Fees and Connection Charges for Affordable Housing Developments

Contact: Meredith Penny, Community Planning Director and Mark Wahl, C.L.E.A.R.

Attachments: Planning Advisory Board Findings of Fact and Proposed Changes to

Chapters 13.01 and 13.50 of the Langley Municipal Code Ordinance

Contact: Meredith Penny, Community Planning Director

b. Discussion on materials and agenda for Housing Action Plan meeting (to be hosted July 21, 2022)

and survey questions going out in July utility billing.

Attachments: Housing Action Plan Community Meeting Draft Presentation and Breakout

Room Discussion and Draft Housing Action Plan Survey Questions

Contact: Meredith Penny, Community Planning Director

c. Status report on active permit applications

Attachments: Memo and Hearing Examiner Final Decision on SDP-21-001

Contact: Meredith Penny, Community Planning Director

#### 7. ANNOUNCEMENTS

#### 8. ADJOURN

**Next Meeting:** August 3, 2022 @ 4pm

#### Statement Regarding Potential Conflicts of Interest -

Officials, employees, consultants, volunteers and vendors are obliged to withdraw from any involvement in a matter where there is a conflict or perceived conflict, even if they feel certain they can act impartially. If a conflict, or potential conflict exists, the affected party shall declare so at the first public meeting when the matter is being considered. And shall withdraw from the meeting or future meetings for the duration of the discussion of the issue.

**Guiding Principles for Citizen Committees and Boards.** 

- a. All advisory board and committee meetings are to be conducted in public session and noticed in accordance with state law, unless otherwise advised by the city attorney.
- b. Individual committee members and the collective group will be fair, impartial, and respectful of the public, staff, and each other.
- c. Committee members will respect the limitations of their individual and collective authority. The role of the committee is to advise the city council and/or staff. Please keep in mind that committee appointment does not empower you to make final decisions, unless authorized by state law or the group's enabling ordinance, or to supervise staff.
- d. Members will strive to appreciate differences in approach and point of view, whether from each other, the community, the city council, or staff.
- e. Each member will participate in the group's discussions and work assignments without dominating the discussion or activity of the committee.
- f. The committee chair will ensure that all members have a fair, balanced, and respectful opportunity to share their knowledge and perspectives.
- g. The committee will attempt to reach consensus on issues. If consensus is not possible, strong differing opinions, such as "minority" opinions, should be recorded and acknowledged in the committee's report to the city council.
- h. There should be "no surprises" from the committee, either in the nature of the workbeing undertaken by the committee or the method and timing for conveyance of recommendations to the city council. The staff liaison fulfills an important role in assisting the committee in this regard.

When presenting recommendations to the Council, it is essential that advisory group members keep the following in mind:

- i. all recommendations should be in written form;
- j. all ideas should be expressed in clear and concise language;
- k. proposed solutions should be viable and cost-effective;
- I. recommendations should identify the reasons for the changes suggested;
- m. the advice should reflect a consensus of a majority of the group members.

Last Saved: 6/30/2022



P.O. Box 366 Langley, WA 98260 (360) 221-4246

# CITY OF LANGLEY PLANNING ADVISORY BOARD SUMMARY MINUTES

June 1, 2022 at 4:00pm

- VIDEO ONLY via ZOOM -

#### 1. CALL TO ORDER:

The meeting was called to order at 4:05 pm by PAB Chair Greg Easton.

#### **ROLL CALL:**

#### Present:

Commissioners Greg Easton (Chair); Casey Gloster; Maureen Freehill; Mary Michell; Rose Hughes (Alternate)

#### Absent:

Deana Duncan

#### **Council and Commission Members:**

Rhonda Salerno (Council), Chris Byrne (DSR)

#### Staff Present:

Meredith Penny, Director of Community Planning; Alex Cattand, Building Permit Technician.

#### **Guest Speaker:**

Mark Wahl

Attendees: 4

#### 2. APPROVAL OF AGENDA:

a. The agenda was approved after a motion by Commissioner Freehill and seconded by Commissioner Michell with the following change of discussion items order from a, b, c to c, b, a and a correction to the title from 'Joint Planning Advisory Board and Public Works Advisory Committee Agenda' to "Planning Advisory Board Agenda'

#### 3. APPROVAL OF MINUTES:

- a. The PAB minutes of April 6, 2022 were approved after a motion by Commissioner Gloster and seconded by Commissioner Freehill.
- b. The PAB minutes of May 4, 2022 were approved after a motion by Commissioner Gloster and seconded by Commissioner Freehill.

#### 4. PUBLIC COMMENT

- No public comments

#### 5. **DISCUSSION:**

a. Discussion on setbacks, height, and priority zones in new draft wireless facilities ordinance.

**Attachments:** Draft wireless facilities ordinance

**Contact:** Meredith Penny, Community Planning Director, and Mark Wahl, C.L.E.A.R.

- Meredith Penny presented the draft on wireless facilities ordinance's sections on setbacks, height, and priority zones.
- Recommendations from Meredith Penny and Mark Wahl (C.L.E.A.R.) were presented to the board.

#### PAB members comments:

- There are 2 wireless 4G facilities (both at each end of 6<sup>th</sup> Street). They average 45-50 ft in height.
- Increase setbacks to prevent new installation near residences.
- The FCC sets the output limits for wireless facilities in urban areas.
- Legally, a wireless facility cannot be restricted strictly on the basis of health considerations but can restrict for aesthetic and/or location (least intrusive).
- Cell signal boosters remains a civil issue.

Meredith Penny to schedule a public hearing with the PAB for July 6<sup>th</sup> to make a recommendation to City Council for the Wireless Ordinance.

b. Presentation of revised public participation plan for City Housing Action Plan effort and community meeting date for July.

**Attachments:** Revised public participation plan for City Housing Action Plan **Contact:** Meredith Penny, Community Planning Director.

- Meredith Penny presented the revisions made to the public participation plan for the Housing Action Plan. [Phase 1: Inform, Phase 2: Needs Assessment, Phase 3: Action Items, Phase 4: Finalize the Housing Action Plan].
- Meredith Penny to ask council for recommendation on scheduling of a community meeting, plans on running the meeting on Zoom and to come back to

PAB on July 6 with more specific presentation material for the community meeting.

#### PAB members comments:

- Preference for community meeting to be held on a weekday (Tuesday or Thursday) evening mid to late of July to avoid the 4th of July holiday.
- Meredith Penny to send out a Doodle Poll.
- The survey to be presented to PAB prior to sending out via the water billing.
- Names can be added to the stakeholder/professional list. The more, the better.
- Stef Christensen: How is the distinction between Langley and other cities going to be established? It is determined by looking at Langley's demographics and average income.
- Paul Schissler is offering his services in answering questions in terms of affordability.
- Presentation of scope of work for the Critical Areas Ordinance Update.
   Attachments: Scope of services from contract with The Watershed Company
   Contact: Meredith Penny, Community Planning Director
  - Meredith Penny presented the Scope of Services from the contract with Watershed Company.

#### PAB members comments:

- The Watershed Company will come to present to PAB their findings and proposed ordinance. The schedule is yet to be determined.
- PAB will be able to act on the proposed changes after those meetings/presentations as the Board will have to provide a recommendation for Council.
- The Watershed Company will hold up to 2 community information sessions for public input/comments and will be hosted on the city zoom platform.
- Example of changes for critical areas. Change the LMC to specify the latest Wetland Rating System, evaluate setback regulation in relation to climate change, ...
- The Watershed Company will start with the Critical Areas Ordinance Update (to be completed by the end of the year) and start the SEPA review next year. The Housing Action Plan consist of a lot of different tasks and involve several consultants and staff. Right now, the group is working on phases 1-2 and next year the Watershed Company will come in for phase 3 (SEPA).

- Concerns about the consultant.
- Concerns about the public involvement.
- The Climate Crisis Advisory Commission can be involved in the discussion if they would like to.
- Marianne Edain ran through her concerns with the contract in terms of public outreach and participation, GIS mapping, SEPA, and mostly the lack of details in the language.
- The consultant will provide the public comments and response matrix.

# 6. ANNOUCEMENT

 Commissioner Easton visited the Camano Ave Project by Tiny Homes in the Name of Christ and was quite impressed by the show unit.

#### 7. ADJOURNMENT

- a. The meeting was adjourned at 5:52 pm
- b. Next regular meeting: July 6, 2022.

Respectfully submitted by: Meredith Penny, Community Planning Director.

# **EXHIBIT A**

Amendments to Langley Municipal Code Chapters:

18.01 and 18.22 LMC.

Addition of new Langley Municipal Code Chapter:

18.23 LMC

# CHAPTER 18.01 INTRODUCTION

#### Sections:

18.01.010 Purpose.

18.01.020 Scope.

18.01.030 Rules for interpretation.

18.01.040 Definitions.

18.01.010 Purpose

...

18.01.020 Scope

. . .

18.01.030 Rules for Interpretation

. . .

#### 18.01.040 Definitions

"Accessory building" means a building which is subordinate to the principal building, and is incidental to the use of the principal building on the same lot. Examples include sheds, shops, garages, greenhouses and barns.

. . .

- "Winery" means a business licensed by the state of Washington that makes and sells wine at wholesale or retail, and includes an on-site location for consumer tasting and purchase.
- "Wireless communications antenna array" means one or more rods, panels, discs or similar devices used for the transmission or reception of radio frequency signals through electromagnetic energy, which may include:
  - 1. Antennas equal to or less than 15 feet in height; and
  - 2. Parabolic antennas equal to or less than 39.37 inches (one meter) in diameter with an area not more than 50 square feet in aggregate.
- "Wireless communications facility" means any unstaffed facility for the transmission and/or reception of radio frequency signals through electromagnetic energy, usually consisting of an equipment shelter or cabinet, a support structure used to achieve the necessary elevation, and the transmission and reception devices or antennas.
- "Wireless communications service" means the providing or offering for rent, sale or lease, or other value received, the transmittal of information between or among points by satellite or similar facilities, with or without benefit of any closed transmission medium.

"Workforce housing" means housing that is affordable for households with incomes between 80 percent and 120 percent (or less) of the area median income (AMI), regardless of tenure.

. . .

#### Chapter 18.22

#### General Provisions and Standards

~		. •		
€.	20	+• ~	ons	٠
. "	-::	11(	1118	

- 18.22.010 Scope.
- 18.22.020 Landscaping design and tree retention.
- 18.22.030 Yards.
- 18.22.040 Fences and hedges.
- 18.22.045 View preservation.
- 18.22.050 Accessory buildings.
- 18.22.055 Water conservation.
- 18.22.060 Home occupations.
- 18.22.065 Residential-zone offices.
- 18.22.070 Short-term rentals General.
- 18.22.080 Violation Penalty.
- 18.22.085 Repealed.
- 18.22.090 Day care centers.
- 18.22.095 Commercial development adjacent to single-family residential zoning districts.
- 18.22.100 Outside storage.
- 18.22.110 Vehicle parking.
- 18.22.115 Electric vehicle charging stations.
- 18.22.120 Barrier-free access.
- 18.22.130 Parking requirements.
- 18.22.140 Design and construction requirements Parking.
- 18.22.150 In-home family day care.
- 18.22.155 Accessory dwelling units.
- 18.22.160 Essential public facilities.
- 18.22.165 Adult family home.
- 18.22.170 Comprehensive plan/concurrency and consistency required.
- 18.22.180 Cottage housing.
- 18.22.190 Wireless communications facilities. Repealed.
- 18.22.200 Clustered residential development (CRD).
- 18.22.210 Retirement living facilities, nursing or convalescent facilities, and congregate care facilities.
- 18.22.220 Condominium binding site plan.
- 18.22.230 Design guidelines for townhouse units.
- 18.22.240 Temporary housing.
- 18.22.250 Green building standards Purpose.
- 18.22.255 Green building standards Setbacks.
- 18.22.260 Green building standards Height.
- 18.22.265 Green building standards Solar access.
- 18.22.270 Green building standards Maximum lot coverage.
- 18.22.280 Boardinghouse.
- 18.22.290 Tiny home (multifamily).

...

#### 18.22.190 Wireless communications facilities.

The following provisions apply to wireless communications facilities:

A. Wireless communication antenna arrays are permitted in any zone as long as they are located upon an existing structure (sign structures are not considered structures for this purpose) that provides sufficient elevation for the array's operation without the necessity of constructing an apparatus to extend the antenna array more than 15 feet above the highest point of the structure.

- B. The following limits apply to the number of arrays on a structure:
  - 1. All residential zones: one.
  - 2. Commercial zones: three.
  - 3. Public use zone: three.
- C. Installation on city property is subject to execution of the necessary agreement(s) with the city.
- D. Landscaping and Screening. Equipment shelter and cabinets and other on the ground ancillary equipment shall be screened by the use of shrubs that achieve sufficient height and fullness upon maturity to screen such facilities.
- E. Color and Lighting. The antenna array shall be placed and colored to blend into the architectural detail and coloring of the host structure.
- F. Setback Requirements. All equipment shelters, cabinets or other in-the-ground ancillary equipment shall meet the setback requirements of the zone in which the equipment is located.
- G. Electromagnetic field/radio frequency radiation standards shall conform to such standards as are required by the Federal Communication Commission's regulations.
- H. Co-Location of Facilities. It is the policy of the city to encourage the co-location of antenna arrays of more than one wireless communication service provider on a single support structure.
- I. Discontinuance of Use. Any wireless communication facility that is no longer needed and its use is discontinued shall be reported immediately by the service provider to the city. Discontinued facilities shall be completely removed within six months and the site restored to the preexisting condition.

...

# <u>CHAPTER 18.23</u> <u>PERSONAL WIRELESS FACILITIES</u>

# Sections:

§18.23	Personal Wireless Service Facilities		
§18.23.010	Purpose and Legislative Intent		
§18.23.020	Definitions; Word Usage		
§18.23.030	Application Types		
§18.23.040	Shot Clock Periods		
§18.23.050	Shot Clock Tolls, Extensions & Reasonable Delay Periods		
§18.23.060	Application Requirements		
§18.23.070	Design Standards		
§18.23.080	Hearing Examiner Initial Review		
§18.23.090	Hearings and Public Notice		
§18.23.100	Factual Determinations to be Rendered by the Hearing Examiner		
§18.23.110	Retention of Consultants		
§18.23.120	Setback Requirements		
§18.23.130	Height Restrictions		
§18.23.140	Use Restrictions and Variances		
§18.23.150	Environmental Impacts		
§18.23.160	Historic Site Impacts		
§18.23.170	Force Majeure		
§18.23.180	Eleventh Hour Submissions		
§18.23.190	Prohibition Against Illegally Excessive Emissions & RF Radiation Testing		
§18.23.200	Bond Requirements & Removal of Abandoned Facilities and Reclamation		
§18.23.210	ADA Accommodations		
§18.23.220	Siting Hierarchy		
§18.23.230	General Provisions		

#### §18.23 Personal Wireless Service Facilities

This Chapter 18.23 is intended to repeal and replace all previous versions of, and amendments to, Section 18.22.190 "Wireless communications facilities" of the Municipal Code of the City of Langley ("Municipal Code"), all of which are hereby repealed and replaced in their entirety by this Chapter 18.23 et. seq., as of the effective date hereof.

No Personal Wireless Service Facility (PWSF) shall be sited, constructed, reconstructed, installed, materially changed or altered, expanded, or used unless in conformity with this Chapter.

For the installation, construction, erection, relocation, substantial expansion, or material alteration of any PWSF, the City shall require a special use permit pursuant to the provisions of this section, which shall be applied for in accord with the procedure set forth within Chapter 18.34 "Design Review", unless otherwise provided herein below.

The performance of maintenance, routine maintenance, in-kind replacement of components, and/or repairs (as defined herein) to an existing PWSF and/or existing personal wireless service equipment shall not require a special use permit.

Each application for a special use permit under this chapter and each individual PWSF for which an application for a special use permit is submitted shall be considered based upon the individual characteristics of each respective installation at each proposed location as an individual case. In other words, each installation, at each proposed location, shall be reviewed and considered independently for its own characteristics and potential impacts, irrespective of whether the proposed facility is designed and intended to operate independently or whether the installation is designed and/or intended to operate jointly as part of a Distributed Antenna (DAS) System.

#### §18.23.010 Purpose and Legislative Intent

The purpose of this section is to promote the health, safety, and general welfare of the residents of the City of Langley and to preserve the scenic, historical, natural, and man-made character and appearance of the City, consistent with Sections 18.01.010 and 18.01.020 of the Municipal Code, while simultaneously providing standards for the safe provision, monitoring, and removal of cell towers and other personal wireless service facilities consistent with applicable federal, state and local laws and regulations.

Consistent with the balancing of interests which the United States Congress intended to embed with the federal Telecommunications Act of 1996 (hereinafter "the TCA"), Chapter 18.23 is intended to serve as a *Smart Planning Provision*, designed to achieve the four (4) simultaneous objectives of: (a) enabling personal wireless service providers to provide adequate personal wireless services throughout the City so that City residents can enjoy the benefits of same, from any FCC-licensed wireless carrier from which they choose to obtain such services, while (b) minimizing the number of cell towers and/or other personal wireless service facilities needed to provide such coverage, (c) preventing, to the greatest extent reasonably practical, any unnecessary adverse impacts upon the City's communities, residential areas, and individual homes, and (d) complying with all of the legal requirements which the TCA imposes upon the City, when the City

receives, processes and determines applications seeking approvals for the siting, construction and operation of cell towers and/or other personal wireless service facilities.

The City seeks to minimize, to the greatest extent possible, any unnecessary adverse impacts caused by the siting, placement, physical size, and/or unnecessary proliferation of, personal wireless service facilities, including, but not limited to, adverse aesthetic impacts, adverse impacts upon property values, adverse impacts upon the character of any surrounding properties and communities, adverse impacts upon historical and/or scenic properties and districts, and the exposure of persons and property to potential dangers such as structural failures, ice fall, debris fall, and fire.

The City also seeks to ensure that, in applying this section, the Design Review Hearing Examiner (the "Hearing Examiner") is vested with sufficient authority to require applicants to provide sufficient, accurate, and truthful probative evidence, to enable the Hearing Examiner to render factual determinations consistent with both the provisions set forth herein below and the requirements of the TCA when rendering decisions upon such applications.

To achieve the objectives stated herein, the City seeks to employ the "General Authority" preserved to it under Section 47 U.S.C.A. §332(c)(7)(A) of the TCA to the greatest extent which the United States Congress intended to preserve those powers to the City, while simultaneously complying with each of the substantive and procedural requirements set forth within the subsections of 47 U.S.C.A. §332(c)(7)(B) of the TCA.

#### §18.23.020 Definitions; Word Usage

For purposes of this Chapter, and where not inconsistent with the context of a particular section, the defined terms, phrases, words, abbreviations, and their derivations, shall have the meaning given in this section. When not inconsistent with the context, words in the present tense include the future tense, words used in the plural number include words in the singular number, and words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory. If, and to the extent that the definitions set forth herein are inconsistent with any other definitions elsewhere within the Municipal code, the definitions herein shall supersede any conflicting definitions set forth elsewhere within the Municipal Code, and the definitions set forth herein below shall control and apply to Chapter 18.23 and all subsections herein.

#### ACCESSORY FACILITY OR ACCESSORY STRUCTURE

A facility or structure serving or being used in conjunction with a personal wireless services facility or complex and located on the same property or lot as the personal wireless services facility or complex, or an immediately adjacent lot including, but not limited to, utility or transmission equipment storage sheds or cabinets.

# **ACHP**

The federal Advisory Council on Historic Preservation.

#### ADEQUATE COVERAGE

As determined by the Hearing Examiner, adequate coverage means that a specific wireless carrier's personal wireless service coverage is such that the vast majority of its customers can successfully use the carrier's personal wireless service the vast majority of the time, in the vast majority of the geographic locations within the City, that the success rate of using their devices exceeds 97%, and that any geographic gaps in a carrier's gaps in personal wireless services are not significant gaps, based upon such factors including, but not limited to, lack of significant physical size of the gap, whether the gap is located upon a lightly traveled or lightly occupied area, whether only a small number of customers are affected by the gap, and/or whether or not the carrier's customers are affected for only limited periods of time. A wireless carrier's coverage shall not be deemed inadequate simply because the frequency or frequencies at which its customers are using its services are not the most preferred frequency of the wireless carrier.

#### **ANTENNA**

An apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location, for the provision of personal wireless service.

#### **APPLICANT**

Any individual, corporation, limited liability company, general partnership, limited partnership, estate, trust, joint-stock company, association of two or more persons having a joint common interest, or any other entity submitting an application for a special use permit, site plan approval, variance, building permit, and/or any other related approval, for the installation, operation and/or maintaining of one or more personal wireless service facilities.

#### **APPLICATION**

Refers to all necessary and required documentation and evidence that an applicant must submit to receive a special use permit, building permit, or other approval for personal wireless service facilities from the City.

#### **CELL TOWER**

A free-standing, guy-wired, or otherwise supported pole, tower, or other structure designed to support or employed to support, equipment and/or antennas used to provide personal wireless services, including, but not limited to, a pole, monopole, monopine, slim stick, lattice tower or other types of standing structures.

#### **CEQ**

The Council on Environmental Quality was established under NEPA.

#### CFR

The Code of Federal Regulations

#### **CITY**

The City of Langley

#### **COLOCATION and/or CO-LOCATE**

To install, mount or add new or additional equipment to be used for the provision of personal wireless services to a pre-existing structure, facility, or complex which is already built and is currently being used to provide personal wireless services, by a different provider of such services, wireless carrier or site developer.

#### COMPLETE APPLICATION, COMPLETED APPLICATION

An application that contains all the necessary and required information, records, evidence, reports, and/or data necessary to enable an informed decision to be made with respect to an application. Where any information is provided pursuant to the terms of this Chapter and the City Planning Official or the City's expert or consultant or the Hearing Examiner determines, based upon information provided, that any additional, further or clarifying information is needed as to one or more aspects, then the application will be deemed incomplete until that further or clarifying information is provided to the satisfaction of the City Planning Official, Hearing Examiner or the City's expert or consultant or the Hearing Examiner.

#### **COMPLEX**

The entire site or facility, including all structures and equipment, located at the site.

### DBM (dBm)

DBM stands for decibel milliwatts, which is a concrete measurement of the wireless signal strength of wireless networks. Signal strengths are recorded in negative numbers, and can typically range from approximately -30 dBm to -110 dBm. The closer the number is to 0, the stronger the cell signal.

#### **DEPLOYMENT**

The placement, construction, or substantial modification of a personal wireless service facility.

#### DISTRIBUTED ANTENNA SYSTEM, DAS

A network of spatially separated antenna nodes connected to a common source via a transport medium that provides personal wireless service within a geographic area.

#### **EFFECTIVE PROHIBITION**

A finding by the Hearing Examiner that, based upon an applicant's submission of sufficient probative, relevant, and sufficiently reliable evidence, and the appropriate weight which the Hearing Examiner deems appropriate to afford same, an applicant has established that an identified wireless carrier does not have adequate coverage as defined hereinabove, but suffers from a significant gap in its personal wireless services within the City and that a proposed installation by that applicant would be the least intrusive means of remedying that gap, such that a denial of the application to install such facility would effectively prohibit the carrier from providing personal wireless services within the City. Any determination of whether an applicant has established, or failed to establish, both the existence of a significant gap and whether its proposed installation is the least intrusive means of remedying such gap, shall be based upon substantial evidence, as is hereinafter defined.

#### **ELEVENTH HOUR SUBMISSIONS**

An applicant's submission of new and/or additional materials in support of an application within forty-eight (48) hours of the expiration of an applicable shot clock (as is hereinafter defined), or at an otherwise unreasonably short period of time before the expiration of the shot clock, making it impracticable for the Hearing Examiner to adequately review and consider such submissions due to their complexity, volume, or other factors, before the expiration of the shot clock.

#### **ENURE**

To serve to the use, benefit, or advantage of a person or party.

#### **EPA**

The United States Environmental Protection Agency.

#### **FAA**

The Federal Aviation Administration, or its duly designated and authorized successor agency.

# **FACILITY**

A set of wireless transmitting and/or receiving equipment, including any associated electronics and electronics shelter or cabinet and generator.

# **FCC**

The Federal Communications Commission.

#### GENERAL POPULATION/UNCONTROLLED EXPOSURE LIMITS

The applicable radiofrequency radiation exposure limits set forth within 47 CFR §1.1310(e)(1), Table 1 Section (ii), made applicable pursuant to 47 CFR §1.1310(e)(3).

#### **HEARING EXAMINER**

An Examiner appointed by the City Council pursuant to sections 18.037.020 and 18.37.030 of the Municipal Code.

#### HEIGHT

When referring to a tower, personal wireless service facility, or personal wireless service facility structure, the height shall mean the distance measured from the pre-existing grade level to the highest point on the tower, facility, or structure, including, but not limited to, any accessory, fitting, fitment, extension, addition, add-on, antenna, whip antenna, lightning rod or other types of lightning-protection devices attached to the top of the structure.

#### HISTORIC STRUCTURE

Any structure that would meet the definition of a regulated structure as defined in this Chapter.

ILLEGALLY EXCESSIVE RF RADIATION or ILLEGALLY EXCESSIVE RADIATION RF radiation emissions at levels that exceed the legally permissible limits set forth within 47 CFR §1.1310(e)(1), Table 1 Sections (i) and (ii), as made applicable pursuant to 47 CFR §1.1310(e)(3).

#### **IN-KIND REPLACEMENT**

The replacement of a malfunctioning component(s) with a properly functioning component of substantially the same weight, dimensions, and outward appearance.

#### **MACROCELL**

A cellular base station that typically sends and receives radio signals from large towers and antennas. These include traditionally recognized cell towers, which typically range from 50 to 199 feet in height.

#### MAINTENANCE or ROUTINE MAINTENANCE

Plumbing, electrical or mechanical work that may require a building permit but that does not constitute a modification to the personal wireless service facility. It is work necessary to assure that a wireless facility and/or telecommunications structure exists and operates: reliably and in a safe manner, presents no threat to persons or property, and remains compliant with the provisions of this chapter and FCC requirements.

#### **MUNICIPAL CODE**

The City of Langley Municipal Code, as the term has been codified in Chapter 1.01.

### NECESSARY or NECESSITY or NEED

What is technologically required for the equipment to function as designed by the manufacturer, and that anything less will result in prohibiting the provision of service as intended and described in the narrative of the application. "Necessary" or "need" does not mean what may be desired, preferred, or the most cost-efficient approach and is not related to an applicant's specific chosen design standards. Any situation involving a choice between or among alternatives or options is not a need or a necessity.

# <u>NE</u>PA

The National Environmental Policy Act, 42 U.S.C. §4321 et seq.

# **NHPA**

The National Historic Preservation Act, 54 U.S.C. §300101 et seq, and 36 CFR Part 800 et seq.

#### NODE, DAS NODE

A fixed antenna and related equipment installation that operates as part of a system of spatially separated antennas, all of which are connected through a medium through which they work collectively to provide personal wireless services, as opposed to other types of personal wireless facilities, such as macrocells, which operate independently.

# **NOTICE ADDRESS**

An address, which is required to be provided by an applicant at the time it submits an application for a special use permit, at which the City, Hearing Examiner and/or City Planning Official can mail notice, and the mailing of any notice to such address by first-class mail shall constitute sufficient notice to any and all applicants, co-applicants, and/or their attorneys, to satisfy any notice requirements under this Chapter, as well as any notice requirements of any other local, state and/or federal law.

#### NOTICE OF INCOMPLETENESS, NOTICE OF INCOMPLETE APPLICATION

A written notice, mailed by first class mail, to an applicant seeking an approval for the installation of a PWEF, wherein the sender advises the applicant that its application is either incomplete, the wrong type of application, or is otherwise defective, and setting for the reason or reasons why the application is incomplete and/or defective.

#### NOTICE OF EFFECTIVE PROHIBITION CONDITIONS

A written notice which is required to be provided to the Town at the time of the filing of any application, by all applicants at seeking any approval, of any type, for the siting, installation and/or construction of a PWSF, wherein the respective applicant asserts, claims or intends to assert or claim, that a denial of their respective application, by any agent, employee, Hearing Examiner or body of the Town, would constitute an "effective prohibition" within the meaning of the TCA, and concomitantly, that a denial of their respective application or request would violate Section 47 U.S.C. §332(c)(7)(B)(i)(II) of the TCA.

# OCCUPATIONAL/CONTROLLED EXPOSURE LIMITS

The applicable radiofrequency radiation exposure limits set forth within 47 CFR §1.1310(e)(1), Table 1 Section (i), made applicable pursuant to 47 CFR §1.1310(e)(2).

#### PERSONAL WIRELESS SERVICE/PERSONAL WIRELESS SERVICES

Commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, within the meaning of 47 U.S.C. §332(c)(7)(c)(i), and as defined therein.

# PERSONAL WIRELESS SERVICE FACILITY, PERSONAL WIRELESS SERVICES FACILITY or PWSF

A facility or facilities used for the provision of personal wireless services, within the meaning of 47 U.S.C. §332(c)(7)(c)(ii). It means a specific location at which a structure that is designed or intended to be used to house or accommodate antennas or other transmitting or receiving equipment is located. This includes, without limitation, towers of all types and all kinds of support structures, including but not limited to buildings, church steeples, silos, water towers, signs, utility poles, or any other structure that is used or is proposed to be used as a telecommunications structure for the placement, installation and/or attachment of antennas or the functional equivalent of such. It expressly includes all related facilities and equipment such as cabling, radios and other electronic equipment, equipment shelters and enclosures, cabinets, and other structures enabling the complex to provide personal wireless services.

### **PROBATIVE EVIDENCE**

Evidence which tends to prove facts, and the more a piece of evidence or testimony proves a fact, the greater its probative value, as shall be determined by the Hearing Examiner, as the finder-of-fact in determining whether to grant or deny applications for special use permits under this provision of the Municipal Code.

#### **REPAIRS**

The replacement or repair of any components of a wireless facility or complex where the replacement is substantially identical to the component or components being replaced, or for any matters that involve the normal repair and maintenance of a wireless facility or complex without the addition, removal, or change of any of the physical or visually discernible components or aspects of a wireless facility or complex that will impose new visible intrusions of the facility or complex as originally permitted.

#### RF

Radiofrequency.

#### RF RADIATION

Radiofrequency radiation, that being electromagnetic radiation which is a combination of electric and magnetic fields that move through space as waves, and which can include both Non-Ionizing radiation and Ionizing radiation.

#### **SECTION 106 REVIEW**

A review under Section 106 of the National Historic Preservation Act.

# **SEPA**

The State Environmental Policy Act

#### **SETBACK**

For purposes of special use permit applications, a setback shall mean the distance between (a) any portion of a personal wireless facility and/or complex, including but not limited to any and all accessory facilities and/or structures, and (b) the exterior line of any parcel of real property or part thereof which is owned by, or leased by, an applicant seeking a special use permit to construct or install a personal wireless facility upon such real property or portion thereof. In the event that an applicant leases only a portion of real property owned by a landlord, the setback shall be measured from the facility to the line of that portion of the real property which is actually leased by the applicant, as opposed to the exterior lot line of the non-leased portion of the property owned by the landlord.

#### SHOT CLOCK

The applicable period which is presumed to be a reasonable period within which the City is generally required to issue a final decision upon an application seeking special use permit approval for the installation or substantial modification of a personal wireless services facility or structure, to comply with Section 47 U.S.C. §332(c)(7)(B)(ii) of the TCA.

### **SITE DEVELOPER or SITE DEVELOPERS**

Individuals and/or entities engaged in the business of constructing wireless facilities and wireless facility infrastructure and leasing space and/or capacity upon, or use of, their facilities and/or infrastructure to wireless carriers. Unlike wireless carriers, site developers generally do not provide personal wireless services to end-use consumers.

#### **SMALL CELL**

A fixed cellular base station that typically sends and receives radio signals and which are mounted upon poles or support structures at substantially lower elevations than macrocell facilities.

#### **SMALL WIRELESS FACILITY (SWF)**

A personal wireless service facility that meets all of the following criteria

- (a) The facility does not extend the height of an existing structure to a total cumulative height of more than fifty (50) feet, from ground level to the top of the structure and any equipment affixed thereto;
- (b) Each antenna associated with the deployment is no more than three (3) cubic feet in volume;
- (c) All wireless equipment associated with the facility, including any pre-existing equipment and any proposed new equipment, cumulatively total no more than twenty-eight (28) cubic feet in volume;
- (d) The facility is not located on tribal land; and
- (e) The facility will not result in human exposure to radiofrequency radiation in excess of the applicable FCC safety standards set forth within Table 1 of 47 CFR §1.1310(E)(1).

### **SPECIAL USE PERMIT**

The official document or permit granted by the Hearing Examiner pursuant to which an applicant is allowed to file for and obtain a building permit to construct and use a personal wireless services facility, personal wireless service equipment, and/or any associated structures and/or equipment which are used to house, or be a part of, any such facility or complex, or to be used to provide personal wireless services.

#### **STATE**

The State of Washington.

#### STEALTH or STEALTH TECHNOLOGY

A design or treatment that minimizes adverse aesthetic and visual impacts on the land, property, buildings, and other facilities adjacent to, surrounding, and generally in the same area as the requested location of such personal wireless service facilities. This shall mean building the least visually and physically intrusive facility and complex under the facts and circumstances.

#### **STRUCTURE**

A pole, tower, base station, or other building, physical support of any form used for, or to be used for, the provision of personal wireless service.

# **SUBSTANTIAL EVIDENCE**

<u>Substantial Evidence means such relevant evidence as a reasonable mind might accept as adequate</u> to support a conclusion. It means less than a preponderance but more than a scintilla of evidence.

#### **TCA**

The Telecommunications Act of 1996, 47 U.S.C. §332(c)

#### **TOLLING or TOLLED**

The pausing of the running of the time period permitted under the applicable shot clock for the respective Type of application for a personal wireless services facility. Where a shot clock is tolled because an application has been deemed incomplete and timely notice of incompleteness was mailed to the applicant, the submission of additional materials by the applicant to complete the application will end the tolling, thus causing the shot clock period to *resume* running, as opposed to causing the shot clock to begin running *anew*.

#### TOWER, TELECOMMUNICATIONS TOWER

Any structure designed primarily to support one or more antennas and/or equipment used or designed for receiving and/or transmitting a wireless signal.

#### **UNDERTAKING**

Any application for a special use permit seeking Hearing Examiner approval for the installation of a personal wireless services facility licensed under the authority of the FCC shall constitute an undertaking within the meaning of NEPA, in accord with 42 CFR §137.289 and 36 CFR §800.16.

#### **WIRELESS CARRIERS or CARRIER**

Companies that provide Personal Wireless Services to end-use consumers.

#### **ZONING APPEALS**

Refers to appeals made to the Hearing Examiner as provided in Chapter 18.37.

§18.23.030 Application Types

There shall be four (4) specific types of applications for special use permits under this section, which shall include Type I, Type II, Type III, and Type IV applications. It shall be the obligation of any applicant to explicitly and correctly identify which type of application they are filing.

# 1. Type I Applications Colocations of Small Wireless Facilities

Type I applications shall be limited to applications wherein an applicant seeks to co-locate a new small wireless facility, as defined in this chapter, by installing new personal wireless service equipment upon an already existing small personal wireless services facility structure.

If the completed facility would still meet the physical limits and requirements to meet the definition of a small wireless facility after the installation of the new equipment, then the application to install such new equipment is a Type I application.

Type I applications shall require applicants to obtain a special use permit and site plan approval from the Hearing Examiner.

# Type II Applications Co-locations which do not meet the definition of a Small Wireless Facility.

Type II applications shall be limited to applications wherein an applicant is seeking to co-locate new personal wireless service equipment by installing such new wireless equipment upon an already existing personal wireless services facility structure, tower, or complex, which does not meet the definition of a small wireless facility or which will not meet the definition of a small wireless facility if and when the proposed new personal wireless service equipment is installed upon the existing facility and/or structure.

Type II applications shall require applicants to obtain a special use permit and site plan approval from the Hearing Examiner.

# 3. Type III Applications New Small Wireless Facilities

Type III applications shall be limited to applications seeking to install and/or construct a new small wireless facility as defined in Section §18.23.20 hereinabove.

Type III applications shall require applicants to obtain a special use permit and site plan approval from the Hearing Examiner.

# 4. Type IV Applications New Towers and All Other Wireless Facilities

Type IV applications shall include applications for the installation of a new telecommunications tower, personal wireless service facility, complex, structure, or equipment, which does not meet the criteria for Type I, Type II, or Type III applications.

Type IV applications shall require applicants to obtain a special use permit and site plan approval from the Hearing Examiner.

#### §18.23.040 Shot Clock Periods

To comply with the requirements of Section 47 U.S.C. 332(c)(7)(B)(ii) of the TCA, the following shot clock periods set forth herein below shall be presumed to be reasonable periods within which the Hearing Examiner shall render determinations upon special use permit applications for personal wireless service facilities.

The Hearing Examiner shall render determinations upon such applications within the periods set forth hereinbelow, unless the applicable shot clock period list below is tolled, extended by agreement or the processing of the application is delayed due to circumstances beyond the Hearing Examiner and/or City's controls, as addressed within subsections §18.23.150; §18.23.160; §18.23.170; §18.23.180 herein below.

# 1. Type I Applications Colocations of Small Wireless Facilities Sixty (60) Days

<u>Unless extended by agreement, tolled, or subject to reasonable delays, the Hearing Examiner shall issue a written decision upon a Type I application within sixty (60) days from the date when the City receives a Type I application.</u>

Upon receipt of a Type I application, the City Planning Official shall review the application for completeness. If the City Planning Official determines the application is: (a) incomplete, (b) missing required application materials, (c) is the wrong type of application, or (d) is otherwise defective, then, within **ten (10) days** of the City's receipt of the application, the City Planning Official, or his designee, shall mail the applicant a Notice of Incompleteness by first class mail, to the Notice Address provided by the applicant.

Within such Notice of Incompleteness, the City Planning Official shall advise the applicant, with reasonable clarity, the defects within its application, including a description of such matters as what items are missing from the application and/or why the application is incomplete and/or defective.

The mailing of a Notice of Incomplete Application by the City Planning Official shall toll the 60-day shot clock, which shall not thereafter resume running unless and until the applicant tenders an additional submission to the City Planning Official to remedy the issues the City Planning Official identified in the Notice of Incomplete Application, which had been mailed to the applicant. The submission of any responsive materials by the applicant shall automatically cause the shot clock period to resume running upon receipt by the City.

If upon receipt of any additional materials from the applicant, the City Planning Official determines that the application is still incomplete and/or defective, then the City Planning Official shall, once again, mail a Notice of Incompleteness within **ten (10) days** of the applicant having filed its supplemental or corrected materials to the City and the shot clock shall once again be tolled, and the same procedure provided for hereinabove shall be repeated.

2. Type II Applications Colocations on existing Towers, Structures or other

Facilities which do not meet the definition of a Small
Wireless Facility. Ninety (90) Days

Unless extended by agreement, tolled, or subject to reasonable delays, the Hearing Examiner shall issue a written decision upon a Type II application within ninety (90) days from the date when the City receives a Type II application.

Upon receipt of a Type II application, the City Planning Official shall review the application for completeness. If the City Planning Official determines the application is: (a) incomplete, (b) missing required application materials, (c) is the wrong type of application, or (d) is otherwise defective, then, within **thirty** (30) days of the City's receipt of the application, the City Planning Official, or his designee, shall mail the applicant a Notice of Incompleteness by first class mail, to the Notice Address provided by the applicant.

Within such Notice of Incompleteness, the City Planning Official shall advise the applicant, with reasonable clarity of the defects within its application, including a description of such matters as what items are missing from the application and/or why the application is incomplete and/or defective.

The mailing of a Notice of Incomplete Application by the City Planning Official shall toll the 90-day shot clock, which shall not thereafter resume running unless and until the applicant tenders an additional submission to the City Planning Official to remedy the issues the City Planning Official identified in the Notice of Incomplete Application, which had been mailed to the applicant.

The submission of any responsive materials by the applicant shall automatically cause the shot clock period to resume running upon receipt by the City.

If upon receipt of any additional materials from the applicant, the City Planning Official determines that the application is still incomplete and/or defective, then the City Planning Official shall, once again, mail a Notice of Incompleteness within ten (10) days of the applicant having filed its supplemental or corrected materials to the City. The shot clock shall once again be tolled, and the same procedure provided hereinabove shall be repeated.

# 3. Type III Applications New Small Wireless Facilities Ninety (90) Days

<u>Unless extended by agreement, tolled, or subject to reasonable delays, the Hearing Examiner shall issue a written decision upon a Type III application within ninety (90) days from the date when the City receives a Type III application.</u>

Upon receipt of a Type III application, the City Planning Official shall review the application for completeness. If the City Planning Official determines the application is: (a) incomplete, (b) missing required application materials, (c) is the wrong type of application, or (d) is otherwise defective, then, within ten (10) days of the City's receipt of the application, the City Planning Official, or his designee, shall mail the applicant a Notice of Incompleteness by first class mail, to the Notice Address which the applicant has provided.

Within such Notice of Incompleteness, the City Planning Official shall advise the applicant, with reasonable clarity, the defects within its application, including a description of such matters as what items are missing from the application and/or why the application is incomplete and/or defective.

The mailing of a Notice of Incomplete Application by the City Planning Official shall toll the 90-day shot clock, which shall start running anew if and when the applicant tenders an additional submission to the City Planning Official to remedy the issues the City Planning Official identified in the Notice of Incomplete Application, which had been mailed to the applicant.

If upon receipt of any additional materials from the applicant, the City Planning Official determines that the application is still incomplete and/or defective, then the City Planning Official shall, once again, mail a Notice of Incompleteness within **ten (10) days** of the applicant having filed its supplemental or corrected materials to the City and the shot clock shall then be tolled, unless and until the applicant files its supplemental and/or corrected materials, at which time the shot clock shall then resume running.

4. Type IV Applications New Towers and All Other Wireless Facilities
One Hundred Fifty (150) Days

<u>Unless extended by agreement, tolled, or subject to reasonable delays, the Hearing Examiner shall issue a written decision upon a Type IV application within one hundred fifty (150) days from the date when the City receives a Type IV application.</u>

Upon receipt of a Type IV application, the City Planning Official shall review the application for completeness. If the City Planning Official determines the application is: (a) incomplete, (b) missing required application materials, (c) is the wrong type of application, or (d) is otherwise defective, then, within **thirty (30) days** of the City's receipt of the application, City Planning Official, or his designee, shall mail the applicant a Notice of Incompleteness by first class mail, to the Notice Address provided by the applicant.

Within such Notice of Incompleteness, the City Planning Official shall advise the applicant, with reasonable clarity, the defects within its application, including a description of such matters as what items are missing from the application and/or why the application is incomplete and/or defective.

The mailing of a Notice of Incomplete Application by the City Planning Official shall toll the 150-day shot clock, which shall not thereafter resume running unless and until the applicant tenders an additional submission to the City Planning Official to remedy the issues the City Planning Official identified in the Notice of Incomplete Application, which had been mailed to the applicant.

The submission of any responsive materials by the applicant shall automatically cause the shot clock period to resume running upon receipt by the City.

If upon receipt of any additional materials from the applicant, the City Planning Official determines that the application is still incomplete and/or defective, then the City Planning Official shall, once again, mail a Notice of Incompleteness within **ten (10) days** of the applicant having filed its supplemental or corrected materials to the City and the shot clock shall once again be tolled, and the same procedure provided for hereinabove shall be repeated.

§18.23.050 Shot Clock Tolls, Extensions & Reasonable Delay Periods

Consistent with the letter and intent of Section 47 U.S.C. §332(c)(7)(B)(ii) of the TCA, each of the shot clock periods set forth within Section §18.23.040 hereinabove shall generally be

presumed to be sufficient periods within which the Hearing Examiner shall render decisions upon special use permit applications.

Notwithstanding same, the applicable shot clock periods may be tolled, extended by mutual agreement between any applicant and/or its representative and the Hearing Examiner, and the Hearing Examiner shall not be required to render its determination within the shot clock period presumed to be reasonable for each type of application, where the processing of such application is reasonably delayed, as described hereinbelow.

# 1. Tolling of the Applicable Shot Clock Due to Incompleteness and/or Applicant Error

As provided for within Section §18.23.40 hereinabove, in the event that the City Planning Official deems an application incomplete, the City Planning Official shall send a Notice of Incompleteness to the applicant to notify the applicant that its application is incomplete and/or contains material errors, and shall reasonably identify the missing information and/or documents and/or the error(s) in the application.

If the City Planning Official mails a Notice of Incompleteness as described hereinabove, the applicable shot clock shall automatically be tolled, meaning that the applicable shot clock period within which the Hearing Examiner is required to render a final decision upon the application shall immediately cease running, and shall not resume running, unless and until the City receives a responsive submission from the applicant.

If and when the applicant thereafter submits additional information in an effort to complete its application, or cure any identified defect(s), then the shot clock shall automatically *resume* running, but shall not be deemed to start running *anew*.

The applicable shot clock period shall, once again, be tolled if the City Planning Official thereafter provides a second notice that the application is still incomplete or defective, despite any additional submissions which have been received by the City, from the applicant, up to that point.

#### 2. Shot Clock Extension by Mutual Agreement

The Hearing Examiner, in its sole discretion, shall be free to extend any applicable shot clock period by mutual agreement with any respective applicant. This discretion on the part of the Hearing Examiner shall include the Hearing Examiner's authority to request, at any time, and for any period of time the Hearing Examiner may deem reasonable or appropriate under the circumstances, consent from a respective applicant, to extend the applicable shot clock period, to enable the Hearing Examiner, the applicant, or any relevant third party, to complete any type of Undertaking or task related to the review, analysis, processing, and determination of the particular application, which is then pending before the Hearing Examiner, to the extent that any such Undertaking, task, or review is consistent with, or reasonably related to, compliance with any federal, state, or local law, and/or the requirements of any provision of the Municipal Code, including but not limited to this Chapter.

In response to any request by the Hearing Examiner, the applicant, by its principal, agent, attorney, site acquisition agent, or other authorized representative can consent to any extension of any applicable shot clock, by affirmatively indicating its consent either in writing or by affirmatively indicating its consent on the record at any public hearing or public meeting. The Hearing Examiner shall be permitted to reasonably rely upon a representative of the applicant indicating that they are authorized to grant such consent on behalf of the respective applicant, on whose behalf they have been addressing the Hearing Examiner within the hearing process.

### 3. Reasonable Delay Extensions of Shot Clock Periods

The City recognizes that there may be situations wherein, due to circumstances beyond the control of the City and/or the Hearing Examiner, the review and issuance of a final decision upon a special use permit application for a personal wireless facility cannot reasonably be completed within the application shot clock periods delineated within Section §18.23.40 hereinabove.

If, despite the exercise of due diligence by the City and the Hearing Examiner, the determination regarding a specific application cannot reasonably be completed within the applicable shot clock period, the Hearing Examiner shall be permitted to continue and complete its review, and issue its determination at a date beyond the expiration of the applicable period, if the delay of such final decision is due to circumstances including, but not limited to, those enumerated hereinbelow, each of which shall serve as a reasonable basis for a reasonable delay of the applicable shot clock period.

Reasonable delays which may constitute proper grounds for extending the presumed sufficient periods for rendering determinations under the applicable shot clock periods may include, but are not necessarily limited to, those set forth within Sections §18.23.150; §18.23.160; §18.23.170; §18.23.180 herein below.

# §18.23.060 Application Requirements

Applications for special use permits under this section shall be made to the City Planning Official, who shall initially determine whether or not the application is complete and/or free of defects upon receipt of the same.

If the City Planning Official determines that the application is defective or incomplete, they shall promptly mail a **Notice of Incompleteness** to the applicant, in accord with §18.23.40 to toll the applicable shot clock, to ensure that the City and the Hearing Examiner are afforded sufficient time to review and determine each respective application.

Each application shall include the following materials, the absence of any one of which listed hereinbelow, shall render the respective application incomplete:

# 1. Special use permit and Site plan Applications

Completed applications for a special use permit and site plan that shall identify all applicants, co-applicants, site developer(s), and wireless carrier(s) on whose behalf the application is being submitted, as well as the property owner of the proposed site.

# 2. Filing Fees

The appropriate filing fees then being charged by the City for applications for special use permit applications and other related applications.

#### 3. A "Notice Address"

A "Notice Address," that being a specific address to which the City, Hearing Examiner, and/or City Planning Official may mail any type of notice, and that the mailing of same to such address shall constitute sufficient notice to any applicant, co-applicant, and/or their attorney, to comply with any requirement under this section as well as any local, state and/or federal law

# 4. Proof of Authorization for Site Occupancy

Where an applicant is not the owner of the real property upon which it seeks to install its equipment or facility, they shall submit proof of authorization to occupy the site at issue. If the applicant is leasing all or a portion of real property upon which it intends to install its new facility or equipment, then the applicant shall provide a written copy of its lease with the owner of such property. The applicant may redact any financial terms contained within the lease, but it shall not redact any portion of the lease which details the amount of area leased nor the specific portion of the real property to which the applicant has obtained the right to occupy, access, or preclude others from entering.

Where an applicant is seeking to Co-Locate new equipment into an existing facility, it shall provide a copy of its written co-location agreement with the owner of such pre-existing facility, from which it may redact any financial terms.

### 5. A Drawn-To-Scale Depiction

The applicant shall submit drawn-to-scale depictions of its proposed wireless support structure and all associated equipment to be mounted thereon, or to be installed as part of such facility, which shall clearly and concisely depict all equipment and the measurements of same, to enable the City Planning Official to ascertain whether the proposed facility would qualify as a small wireless facility as defined under this Chapter.

If the applicant claims that its proposed installation qualifies as a small wireless facility within this Chapter, the drawn-to-scale depiction shall include complete calculations for all of the antennas and equipment of which the facility will be comprised, depicting that,

when completed, the installation and equipment will meet the physical size limitations which enable the facility to qualify as a small wireless facility.

### 6. Site plan

The applicant shall submit a site plan and site plan application in accordance with Chapter 18.27 of the Municipal Code. The site plan shall show all existing and proposed structures and improvements, including antennas, roads, buildings, guy wires and anchors, parking, and landscaping, and shall include grading plans for new Facilities and roads. Any methods used to conceal the modification of the existing facility shall be indicated on the site plan.

# 7. Engineer's Report

To the extent that an application proposes the co-location of new equipment onto an existing tower or facility, the applicant shall provide an engineer's report certifying that the proposed shared use will not diminish the structural integrity and safety of the existing structure and explaining what modifications, if any, will be required in order to certify to the above.

### 8. Environmental Assessment Form

A completed environmental assessment form (EAF) and a completed visual EAF addendum.

#### 9. Visual Impact Analysis

A completed visual impact analysis, which, at a minimum, shall include the following:

#### (a) Small Wireless Facilities

For applications seeking approval for the installation of a small wireless facility, the applicant shall provide a visual impact analysis which shall include photographic images taken from the perspectives of the properties situated in closest proximity to the location being proposed for the siting of the facility, as well as those properties which would reasonably be expected to sustain the most significant adverse aesthetic impacts due to such factors as their close proximity to the site, their elevation relative to the site, the existence or absence of a "clear line of sight" between the tower location and their location.

(b) Telecommunications Towers and Personal Wireless Service Facilities which do not meet the definition of a Small Wireless Facility

For applications seeking approval for the installation of a telecommunications tower or a personal wireless service facility that does not meet the definition of a small wireless facility, the applicant shall provide:

- (i) A "Zone of Visibility Map" to determine locations from where the new facility will be seen.
- from the perspectives of the properties situated in closest proximity to the location being proposed for the siting of the facility, as well as those properties which would reasonably be expected to sustain the most significant adverse aesthetic impacts due to such factors as their close proximity to the site, their elevation relative to the site, the existence or absence of a "clear line of sight" between the tower location and their location.

The photographic images shall depict the height at which the proposed facility shall stand when completed, including all portions and proposed attachments to the facility, including, but not limited to, the main support structure, all antennas, transmitters, whip antennas, lightning rods, t-bars, crossbars, and cantilever attachments which shall, in whole or in part, be affixed to it, any and all surrounding equipment compound(s), fencing, cellular equipment cabinets, transformers, transformer vaults and/or cabinets, sector distribution boxes, ice bridges, backup generators, including but not limited to equipment boxes, switch boxes, backup generators, ice bridges, etc., to the extent that any of such compound and/or equipment will be visible from properties other than the property upon which the proposed tower and compound are to be installed.

The visual impact analysis shall include an assessment of alternative designs and color schemes, as well as an assessment of the visual impact of the proposed facility, taking into consideration any supporting structure which is to be constructed, as well as its base, guy wires, accessory structures, buildings, and overhead utility lines from abutting properties and streets.

#### 10. Alternative Site Analysis

A completed alternative site analysis of all potential less intrusive alternative sites which the applicant has considered, setting forth their respective locations, elevations, and suitability or unsuitability for remedying whatever specific wireless coverage needs the respective applicant or a specific Wireless Carrier is seeking to remedy by the installation of the new facility which is the subject of the respective application for a special use permit.

If, and to the extent that an applicant claims that a particular alternative site is unavailable, in that the owner of an alternative site is unwilling or unable to accommodate a wireless facility upon such potential alternative site, the applicant shall

provide probative evidence of such unavailability, whether in the form of communications or such other form of evidence that reasonably establishes same.

# The alternative site analysis shall contain:

- (a) an inventory of all existing tall structures and existing or approved communications towers within a two-mile radius of the proposed site.
- (b) a map showing the exact location of each site inventoried, including latitude and longitude (degrees, minutes, seconds), ground elevation above sea level, the height of the structure and/or tower, and accessory buildings on the site of the inventoried location.
- (c) an outline of opportunities for shared use of an existing wireless facility as opposed to the installation of an entirely new facility.
- (d) a demonstration of good-faith efforts to secure shared use from the owner of each potential existing tall structure and existing or approved communications tower, as well as documentation of the physical, technical, and/or financial reasons why shared usage is not practical in each case.

# 11. FCC Compliance Report

An FCC compliance report, prepared by a licensed engineer, and certified under penalties of perjury, that the content thereof is true and accurate, wherein the licensed engineer shall certify that the proposed facility will be FCC compliant as of the time of its installation, meaning that the facility will not expose members of the general public to radiation levels that exceed the permissible radiation limits which the FCC has set.

If it is anticipated that more than one carrier and/or user is to install transmitters into the facility that the FCC compliance report shall take into account anticipated exposure from all users on the facility and shall indicate whether or not the combined exposure levels will, or will not exceed the permissible General Population Exposure Limits, or alternatively, the occupational Exposure Limits, where applicable.

Such FCC Compliance Report shall provide the calculation or calculations with which the engineer determined the levels of RF radiation and/or emissions to which the facility will expose members of the general public.

On the cover page of the report, the report shall explicitly specify: (a) Whether the applicant and their engineer are claiming that the appliable FCC limits based upon which they are claiming FCC compliance are the *General Population Exposure* Limits or the *Occupational Exposure Limits*. If the applicant and/or their engineer are asserting that the Occupational Exposure Limits apply to the proposed installation, they shall detail a factual basis as to why they claim that the higher set of limits is applicable, (b) The exact minimum distance factor, measured in feet, which the applicant's engineer used to calculate the level of radiation emissions to which the proposed facility will expose members of the general public. The minimum distance factor is the closest distance (i.e., the minimum distance) to which a member of the general public shall be able to gain

access to the transmitting antennas mounted upon, or which shall be a part of, the proposed facility.

#### 12. FCC License

A copy of any applicable Federal Communications Commission license possessed by any carrier named as an applicant, co-applicant, or whose equipment is proposed for installation as of the time the application is being filed with the City.

#### 13. Effective Prohibition Claims

The City is aware that applicants seeking approvals for the installation of new wireless Facilities often assert that federal law, and more specifically the TCA, prohibits the local government from denying their respective applications.

In doing so, they assert that their desired facility is "necessary" to remedy one or more significant gaps in a carrier's personal wireless service, and they proffer computergenerated propagation maps to establish the existence of such purported gaps.

The City is additionally aware that, in August 2020, driven by a concern that propagation maps created and submitted to the FCC by wireless carriers were inaccurate, the FCC caused its staff to perform actual drive tests, wherein the FCC staff performed 24,649 tests, driving nearly ten thousand (10,000) miles through nine (9) states, with an additional 5,916 stationary tests conducted at 42 locations situated in nine (9) states.

At the conclusion of such testing, the FCC Staff determined that the accuracy of the propagation maps submitted to the FCC by the wireless carriers had ranged from as little as 16.2% accuracy to a maximum of 64.3% accuracy.

As a result, the FCC Staff recommended that the FCC no longer accept propagation maps from wireless carriers without supporting drive test data to establish their accuracy. A copy of the FCC Staff's 66-page report is made a part of this Chapter as Appendix 1. The City considers it of critical import that applicants provide truthful, accurate, complete, and sufficiently reliable data to enable the Hearing Examiner to render determinations upon applications for new wireless Facilities consistent with both the requirements of this Chapter and the statutory requirements of the TCA.

Consistent with same, if, at the time of filing an application under this Chapter, an applicant intends to assert before the Hearing Examiner or the City that: (a) an identified wireless carrier suffers from a significant gap in its personal wireless services within the City, (b) that the applicant's proposed installation is the least intrusive means of remedying such gap in services, and/or (c) that under the circumstances pertaining to the application, a denial of the application by the Hearing Examiner would constitute an "effective prohibition" under Section 47 U.S.C. §332 the TCA, then, at the time of filing such application, the applicant shall be required to file a written statement which shall be entitled:

# "Notice of Effective Prohibition Conditions"

If an applicant files a Notice of Effective Prohibition Conditions, then the applicant shall be required to submit Probative Evidence to enable the Hearing Examiner to reasonably determine: (a) whether or not the conditions alleged by the respective applicant exist, (b) whether there exists a significant gap or gaps in an identified wireless carrier's personal wireless services within the City, (c) the geographic locations of any such gaps, and (d) the geographic boundaries of such gaps, to enable the Hearing Examiner to determine whether granting the respective application would be consistent with the requirements of this Chapter and the legislative intent behind same, and whether or not federal law would require the Hearing Examiner to grant the respective application, even if it would otherwise violate the City's Municipal Code, including, but not limited to, this Chapter.

The additional materials which the applicant shall then be required to provide shall include the following:

### (a) Drive Test Data and Maps

If, and to the extent that an applicant claims that a specific wireless carrier suffers from a significant gap in its personal wireless services within the City, the applicant shall conduct or cause to be conducted a drive test within the specific geographic areas within which the applicant is claiming such gap or gaps exist, for each frequency at which the carrier provides personal wireless services. The applicant shall provide the City and the Hearing Examiner with the actual drive test data recorded during such drive test, in a simple format which shall include, in table format:

- (i) the date and time for the test or test,
- (ii) the location, in longitude and latitude of each point at which signal strength was recorded and
- (iii) each signal strength recorded, measured in DBM, for each frequency.

Such data is to be provided in a separate table for each frequency at which the respective carrier provides personal wireless services to any of its end-use customers.

(iv) the applicant shall also submit drive test maps, depicting the actual signal strengths recorded during the actual drive test, for each frequency at which the carrier provides personal wireless services to its end-use customers.

If an applicant claims that it needs a "minimum" signal strength (measured in DBM) to remedy its gap or gaps in service, then for each frequency, the applicant shall provide three (3) signal strength coverage maps reflecting actual signal strengths in three (3) DBM bins, the first being at the alleged minimum signal strength, and two (2) additional three (3) DBM bin maps depicting signal strengths immediately below the alleged minimum signal strength claimed to be required.

By way of example, if the applicant claims that it needs a minimum signal strength of – 95 DBM to remedy its alleged gap in service, then the applicant shall provide maps depicting the geographic area where the gap is alleged to exist, showing the carrier's coverage at – 95 to -98 DBM, -99 to -101 DBM and -102 to -104 DBM, for each frequency at which the carrier provides personal wireless services to its end-use customers.

# (b) Denial of Service and/or Dropped Call Records

If and to the extent that an applicant claims that a specific wireless carrier suffers from a capacity deficiency, or a gap in service that renders the carrier incapable of providing adequate coverage of its personal wireless services within the City, then the applicant shall provide dropped call records and denial of service records evidencing the number and percentage of calls within which the carrier's customers were unable to initiate, maintain and conclude the use of the carrier's personal wireless services without actual loss of service, or interruption of service.

# 14. Estimate for Cost of Removal of Facility

A written estimate for the cost of the decommissioning, removal of the facility, including all equipment that comprises any portion or part of the facility, compound, and/or complex, as well as any accessory facility or structure, including the cost of the full restoration and reclamation of the site, to the extent practicable, to its condition before development in accord with the decommissioning and reclamation plan required herein

#### 15. Property Owner Consent & Liability Acknowledgement

A signed written consent from each owner of the subject real property upon which the respective applicant is seeking installation of its proposed personal wireless service facility, wherein the owner or owners, both authorize the applicant to file and pursue its special use permit application and acknowledge the potential landowner's responsibility, under section §18.23.110 for engineering, legal and other consulting fees incurred by the City.

#### §18.23.070 Design Standards

The following design standards shall apply to all applications for the siting, construction, maintenance, use, erection, movement, reconstruction, expansion, material change, or structural alteration of a personal wireless service facility.

#### 1. Small Wireless Facilities

Small Wireless Facilities (SWF) shall be sited to inflict the minimum adverse impacts upon individual residential properties, and specifically, to minimize, to the greatest extent reasonably feasible, adverse aesthetic impacts upon residential homes or reductions in the property values of same.

SWFs attached to pre-existing wooden and non-wooden poles shall conform to the following criteria:

- (a) Proposed antenna and related equipment shall meet:
  - (i) design standards which the City may maintain and update as needed,
    provided that the City makes its designed standards publicly available for
    review by any potential applicant seeking approval for the installation
    of an SWF within the City, and
  - (ii) National Electric Safety Code (NESC) standards; and
  - (iii) National Electrical Code (NEC) standards.
- (b) Antennas and antenna equipment, including but not limited to radios, cables,
  associated shrouding, disconnect boxes, meters, microwaves, and conduit, which
  are mounted on poles, shall be mounted as close to the pole as technically
  feasible. They shall not be illuminated except as required by municipal, federal, or
  state authority, provided this shall not preclude deployment on a new or
  replacement street light.
- (c) Antennas and associated equipment enclosures must be camouflaged to appear as an integral part of the pole or be mounted as close to the pole as feasible.

  Conduits and cabinets shall cover all cables and wiring to the extent that it is technically feasible if allowed by the pole owner. The number of conduits shall be minimized to the extent technically feasible. To the extent technically feasible, antennas, equipment enclosures, and all ancillary equipment, boxes, and conduits shall match the approximate material and design of the surface of the pole or existing equipment on which they are attached.

SWFs attached to replacement poles and new poles shall conform to the criteria set forth herein above for SWF's attached to pre-existing wooden and non-wooden poles, but shall additionally conform to the following criteria:

- (a) The City prefers that wireless providers and site developers install SWF's on existing or replacement poles instead of installing new poles, and accordingly, to obtain approval for the installation of a new pole, the provider shall be required to document that installation on an existing or replacement pole is not technically feasible.
- (b) To the extent technically feasible, all replacement poles and new poles and polemounted antennas and equipment shall substantially conform to the material and design of the pole being replaced, or in the case of a new pole, it shall conform to the nearest adjacent pole or poles.
- (c) The height of replacement poles and new poles shall conform with the height limitations applicable to the district within which the applicant seeks to install

their proposed SWF unless the applicant obtains a variance to obtain relief from any such limitation(s).

2. Telecommunications Towers and Personal Wireless Service Facilities which do not meet the definition of a Small Wireless Facility

The design of a proposed new telecommunications tower or personal wireless service facility shall comply with the following:

- (a) The choice of design for installing a new personal wireless service facility or the substantial modification of an existing personal wireless service facility shall be chosen to minimize the potential adverse impacts that the new or expanded facility may, or is likely to, inflict upon nearby properties.
- (b) Any new telecommunications tower shall be designed to accommodate future shared use by other communications providers.
- (c) Unless specifically required by other regulations, a telecommunications tower shall have a finish (either painted or unpainted) that minimizes its degree of visual impact.
- (d) Notwithstanding the height restrictions listed elsewhere in this Chapter, the maximum height of any new telecommunications tower shall not exceed that which shall permit operation without artificial lighting of any kind or nature, in accordance with municipal, state, and/or federal law and/or regulation.

#### (e) Accessory Structures

- (i) Accessory structures shall maximize the use of building materials, colors, and textures designed to blend with the natural surroundings. The use of camouflage communications towers may be required by the Hearing Examiner to blend the communications tower and/or its accessory structures further into the natural surroundings. "Camouflage" is defined as the use of materials incorporated into the communications tower design that give communications towers the appearance of tree branches and bark coatings, church steeples and crosses, sign structures, lighting structures, or other similar structures.
- (ii) Accessory structures shall be designed to be architecturally similar and compatible with each other and shall be no more than 12 feet high. The buildings shall be used only for housing equipment related to the particular site. Whenever possible, the buildings shall be joined or clustered so as to appear as one building.
- (iii) No portion of any telecommunications tower or accessory structure shall be used for a sign or other advertising purpose, including but not limited to

the company name, phone numbers, banners, and streamers, except the following. A sign of no greater than two square feet indicating the name of the facility owner(s) and a twenty-four-hour emergency telephone shall be posted adjacent to any entry gate. In addition, "no trespassing" or other warning signs may be posted on the fence. All signs shall conform to the sign requirements of the City and/or Municipal Code.

- (f) Towers must be placed to minimize visual impacts. Applicants shall place towers on the side slope of the terrain so that, as much as possible, the top of the tower does not protrude over the ridgeline, as seen from public ways.
- (g) Existing vegetation. Existing on-site vegetation shall be preserved to the maximum extent possible. No cutting of trees shall take place on a site connected with an application made under this Chapter prior to the approval of the special use permit use.

#### (h) Screening.

- (i) Deciduous or evergreen tree plantings may be required to screen portions of the telecommunications tower and accessory structures from nearby residential property as well as from public sites known to include important views or vistas.
- (ii) Where a site adjoins a residential property or public property, including streets, screening suitable in type, size and quantity shall be required by the Hearing Examiner.
- (iii) The applicant shall demonstrate to the approving Hearing Examiner that adequate measures have been taken to screen and abate site noises such as heating and ventilating units, air conditioners, and emergency power generators. Telecommunications towers shall comply with all applicable sections of this chapter as it pertains to noise control and abatement.
- (i) Lighting. Telecommunications towers shall not be lighted except where FAA/FCC required lighting of the telecommunications towers necessary. No exterior lighting shall spill from the site in an unnecessary manner.

#### (i) Access.

(a) Adequate emergency and service access shall be provided and maintained.

Maximum use of existing roads, public or private, shall be made. Road

construction shall, at all times, minimize ground disturbance and

vegetation cutting to the top of fill, the top of cuts, or no more than 10 feet

- beyond the edge of any pavement. Road grades shall closely follow natural contours to assure minimal visual disturbance and reduce soil erosion potential.
- (b) To the extent feasible, all network interconnections to and from the telecommunications site and all power to the site shall be installed underground. At the initial construction of the access road to the site, sufficient conduit shall be laid to accommodate the maximum possible number of telecommunications providers that might use the facility.
- (k) Parking. Parking shall be provided to assure adequate emergency and service access. The Hearing Examiner shall determine the number of required spaces, but in no case shall the number of parking spaces be less than two spaces.
- (1) Fencing. The telecommunications tower and any accessory structures shall be adequately enclosed by a fence, the design of which shall be approved by the Hearing Examiner. The Hearing Examiner may waive this requirement if the applicant demonstrates that such measures are unnecessary to ensure the security of the facility.

#### §18.23.080 Hearing Examiner Initial Review

#### 1. Initial Review

Upon their acceptance of an application that appears to be complete, the City Planning Official shall transmit the application to the Hearing Examiner for initial review.

The Hearing Examiner shall then conduct an initial review to consider whether or not to establish itself as Lead Agency pursuant to SEPA and/or NEPA and whether or not a use or area variance is required for the proposed application such that a referral for an application to the Hearing Examiner will be required to be made after the Hearing Examiner has declared itself to serve as Lead Agency and during the process of the Planning Hearing Examiner considering a SEPA determination of environmental significance. That consideration of granting any required variances by the Hearing Examiner is done concurrently with the Hearing Examiner's review and consideration of special use permit and site plan approval.

The Hearing Examiner shall then conduct a public hearing upon each application, and render its determinations in accord with Sections §18.23.090 and §18.23.100 herein below, and shall ultimately determine whether or not to grant each applicant a special use permit and/or site plan approval.

#### §18.23.090 Hearings and Public Notice

#### 1. Public Hearings

The Hearing Examiner shall conduct a public hearing upon each special use permit application, consistent with the procedures in Section §18.36.060, except the Hearing Examiner shall have authority to schedule such additional or more frequent public hearings as may be necessary to comply with the applicable shot clocks imposed upon the City and the Hearing Examiner under the requirements of the TCA.

#### 2. Required Public Notices

The Hearing Examiner shall ensure that both the public and property owners whose properties might be adversely impacted by the installation of a wireless facility receive Notice of any public hearing pertaining to same and shall ensure that they are afforded an opportunity to be heard concerning same.

Before the date scheduled for the public hearing, the Hearing Examiner shall cause to be published a

#### "NOTICE OF PUBLIC HEARING FOR NEW WIRELESS FACILITY"

Each "Notice of Public Hearing for New Wireless Facility shall state the name or names of the respective applicant or co-applicants, provide a brief description of the personal wireless facility for which the applicant seeks a special use permit, and the date, time, and location of the hearing.

Each "Notice of Public Hearing for New Wireless Facility" shall be published both: (a) in one or newspapers in the manner set forth within, and consistent with Section §1.16.010 and §18.36.020 and by mailing copies of such notice to property owners, as provided for herein below.

The face of each envelope containing the notices of the public hearing shall state, in all bold typeface, in all capital letters, in a font size no smaller than 12 point, the words:

#### "NOTICE OF PUBLIC HEARING FOR NEW WIRELESS FACILITY"

For Type I and Type III applications, notices of public hearing shall be mailed to all property owners whose real properties are situated within 300 feet of any property line of the real property upon which the applicant seeks to install its new wireless facility. If the site for the proposed facility is situated on, or adjacent to, a residential street containing twelve (12) houses or less, the Hearing Examiner shall additionally mail a copy of such notices to all homeowners on that street, even if their home is situated more than 300 feet from any property line of the property upon which the applicant proposes to install its facility.

For Type II and Type IV applications, the applicant shall mail such notices of public hearing to all property owners whose real properties are situated within 1,500 feet of any property line of the real property upon which the applicant seeks to install its new wireless facility.

The applicant shall additionally post a notice upon the proposed site advising the public of the public hearing.

Prior to the date of the hearing, the respective applicant shall file an Affidavit of Mailing, attesting to whom such notices were mailed by the applicant, and the content of the notices which were mailed to such recipients.

#### §18.23.100 Factual Determinations to be Rendered by the Hearing Examiner

#### 1. Evidentiary Standards

In determining special use permit applications for personal wireless service facilities, the Hearing Examiner shall have sole discretion to determine what probative evidence it shall require each applicant to produce in support of its application to enable the Hearing Examiner to make each of the factual determinations enumerated below.

By way of common examples of the types of evidence which the Hearing Examiner may require an applicant to produce, are the following:

- (a) where an applicant is not the owner of the real property upon which it proposes to install a new wireless facility, the Hearing Examiner can require the applicant to provide a copy of the applicant's lease with the property owner (including any schedules, property descriptions, appendices or other attachments), from which the applicant may censor or delete any financial terms which would be irrelevant to the factual issues which the Hearing Examiner is required to determine;
- where the Hearing Examiner deems it appropriate, the Hearing Examiner can require the applicant to perform what is commonly known as a "balloon test" and to require the applicant to publish reasonably sufficient advance public notice of same, to enable the Hearing Examiner, property owners, and the community, an opportunity to assess the actual adverse aesthetic impact which the proposed facility is likely to inflict upon the nearby properties and surrounding community;
- where the applicant asserts a claim that a proposed facility is necessary to remedy one or more existing significant gaps in an identified wireless carrier's personal wireless services, the Hearing Examiner may require the applicant to provide drive-test generated coverage maps, as opposed to computer-generated coverage maps, for each frequency at which the carrier provides personal wireless services, to show signal strengths in bins of three (3) DBM each, to enable the Hearing Examiner to assess the existence of such significant gaps accurately, and/or

whether the carrier possesses adequate coverage within the geographic area which is the subject of the respective application.

(d) where the applicant asserts that a potential less intrusive alternative location for a proposed facility is unavailable because the owner of the potential alternative site is incapable or unwilling to lease space upon such site to the applicant, the Hearing Examiner may require the applicant to provide proof of such unwillingness in the form of communications to and from such property owner, and/or a sworn affidavit wherein a representative of the applicant affirms, under penalty of perjury, that they attempted to negotiate a lease with the property owner, what the material terms of any such offer to the property owner were, when the offer was tendered, and how, if at all, the property owner responded to such offer.

The Hearing Examiner shall have sole discretion to determine, among other things, the relevance of any evidence presented, the probative value of any evidence presented, the credibility of any testimony provided, whether expert or otherwise, and the adequacy of any evidence presented.

The Hearing Examiner shall not be required to accept, at face value, any unsupported factual claims asserted by an applicant but may require the production of evidence reasonably necessary to enable the Hearing Examiner to determine the accuracy of any factual allegations asserted by each respective applicant.

Conclusory factual assertions by an applicant shall not be accepted as evidence by the Hearing Examiner.

#### 2. Factual Determinations

To decide applications for special use permits under this section, the Hearing Examiner shall render factual determinations, which shall include two (2) specific types of factual determinations, as applicable.

First, the Hearing Examiner shall render local zoning determinations according to Section (a) hereinbelow.

Then, if, and only if, an applicant asserts claims that: (a) its proposed wireless facility or installation is necessary to remedy a significant gap in personal wireless services for an explicitly identified wireless carrier, and (b) that its proposed installation is the least intrusive means of remedying a specifically identified significant gap or gaps, the Hearing Examiner shall additionally render TCA determinations, in accord with Section (b) hereinbelow.

The Hearing Examiner shall separately record each factual determination it makes in a written decision and shall reference, or make note of, the evidence based upon which it rendered each of its factual determinations.

Each factual determination made by the Hearing Examiner shall be based upon Substantial Evidence.

For purposes of this provision, "Substantial Evidence" shall mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It means less than a preponderance but more than a scintilla of evidence.

Evidence which the Hearing Examiner may consider shall include any evidence submitted in support of an application, and any evidence submitted by anyone opposing a respective application, whether such evidence is in written or photographic form, or whether it is in the form of testimony by any expert, or any person who has personal knowledge of the subject of their testimony. The Hearing Examiner may, of course, additionally consider as evidence any information or knowledge which they, themselves, personally possess, and any documents, records or other evidence which is a matter of public record, irrespective of whether such public record is a record of the City, or is a record of or is maintained by, another federal, state and/or other governmental entity and/or agency which maintains records which are available for, or subject to, public review.

The requirements for specific factual determinations set forth below are intended to enure to the benefit of the City, its residents, and property owners, and not applicants.

If, and to the extent that the Hearing Examiner fails to render one or more of such determinations, that omission shall not constitute grounds upon which the respective applicant can seek to annul, reverse or modify any decision of the Hearing Examiner.

#### (a) Local Zoning Determinations

The Hearing Examiner shall make the following factual determinations as to whether the application meets the requirements for granting a special use permit under this Chapter.

#### (i) Compliance with Chapter 18.36

Whether the proposed installation will meet each of the conditions and standards set forth within Chapter 18.36 in the absence of which the Hearing Examiner is not authorized to grant a special use permit.

#### (ii) Potential Adverse Aesthetic Impacts

Whether the proposed installation will inflict a significant adverse aesthetic impact upon properties that are located adjacent to, or in close proximity to, the proposed site, or any other properties situated in a manner that would sustain significant adverse aesthetic impacts by the installation of the proposed facility.

#### (iii) Potential Adverse Impacts Upon Real Estate Values

Whether the proposed installation will inflict a significant adverse impact upon the property values of properties that are located adjacent to, or in close proximity to the proposed site, or properties that are otherwise situated in a manner that would cause the proposed installation to inflict a significant adverse impact upon their value.

## (iv) Potential Adverse Impact Upon the Character of the Surrounding <u>Community</u>

Whether the proposed installation will be incompatible with the use and/or character of properties located adjacent to or in close proximity to the proposed site or other properties situated in a manner that would cause the proposed installation to be incompatible with their respective use.

#### (v) Potential Adverse Impacts Upon Historic Properties or Historic Districts

Whether the proposed installation will be incompatible with and/or would have an adverse impact upon, or detract from the use and enjoyment of, and/or character of a historic property, historic site, and/or historic district, including but not limited to historic structures, properties and/or districts which are listed on, or are eligible for listing on, the National Register of Historic Places.

### (vi) Potential Adverse Impacts Upon Ridgelines or Other Aesthetic Resources of The City

Whether the proposed installation will be incompatible with and/or would have an adverse aesthetic impact upon or detract from the use and enjoyment of, and/or character of, recognized aesthetic assets of the City including, but not limited to, scenic areas and/or scenic ridgelines, scenic areas, public parks, and/or any other traditionally or historically recognized valuable scenic assets of the City.

#### (vii) Sufficient Fall Zones

Whether the proposed installation shall have a sufficient fall zone and/or safe zone around the facility to afford the general public safety against the potential dangers of structural failure, icefall, debris fall, and fire.

#### (viii) Most Preferred Site on Hierarchy

Whether the site chosen by the applicant for its proposed facility is situated in the most preferred District within the hierarchy of preferred Districts set forth within section §18.23.220, and whether the applicant has established before the Hearing Examiner that it is not feasible for the applicant's proposed new facility to be siting in a more preferred District listed within such section.

#### (ix) Mitigation

Whether the applicant has mitigated the potential adverse impacts of the proposed facility to the greatest extent reasonably feasible. To determine mitigation efforts on the part of the applicant, the mere fact that a less intrusive site, location, or design would cause an applicant to incur additional expense is not a reasonable justification for an application to have failed to propose reasonable mitigation measures.

If when applying the evidentiary standards set forth in subparagraph (a) hereinabove, the Hearing Examiner determines that the proposed facility would not meet the standards set forth within Chapter 18.36, or that the proposed facility would inflict one or more of the adverse impacts described hereinabove to such a substantial extent that granting the respective application would inflict upon the City and/or its citizens and/or property owners the types of adverse impacts which this provision was enacted to prevent, the Hearing Examiner shall deny the respective application for a special use permit unless the Hearing Examiner additionally finds that a denial of the application would constitute an Effective Prohibition, as provided for in Sections (b) and (c) immediately hereinbelow.

#### (b) TCA Determinations

In cases within which an applicant has filed a "Notice of Effective Prohibition Conditions," the Hearing Examiner shall make three (3) additional factual determinations, as listed herein below:

#### (i) Adequate Personal Wireless Services Coverage

Whether the specific wireless carrier has adequate personal wireless services coverage within the geographic areas for which the applicant claims a significant gap exists in such coverage.

#### (ii) Significant Gap in Personal Wireless Services of an Identified Carrier

Whether the applicant has established, based upon probative evidence provided by the applicant and/or its representative, that a specific wireless carrier suffers from a significant gap in its personal wireless services within the City.

In rendering such determination, the Hearing Examiner shall consider factors including, but not necessarily limited to (a) whether the identified wireless carrier which is alleged to suffer from any significant gap in their personal wireless services has adequate service in its personal wireless services at any frequency being used by the carrier to provide personal wireless services to its end-use customers, (b) whether any such alleged gap is relatively large or small in geographic size, (c) whether the number of the carrier's customers affected by the gap is relatively small or large, (d) whether or not the location of the gap is

situated on a lightly traveled road, or sparsely or densely occupied area, and/or (d) overall, whether the gap is relatively insignificant or otherwise relatively *de minimis*.

A significant gap cannot be established simply because the carrier's customers are currently using the carrier's personal wireless services, but the frequency at which the customers are using such services is not the frequency most desired by the carrier.

#### (iii) Least Intrusive Means of Remedying Gap(s) in Service

Whether the applicant has established based upon probative evidence provided by the applicant and/or its representative, that the installation of the proposed facility, at the specific site proposed by the applicant, and the specific portion of the site proposed by the applicant, and at the specific height proposed by the applicant is the least intrusive means of remedying whatever significant gap or gaps which the applicant has contemporaneously proved to exist as determined by the Hearing Examiner based upon any evidence in support of, and/or in opposition to, the subject application.

In rendering such determination, the Hearing Examiner shall consider factors including, but not necessarily limited to: (a) whether the proposed site is the least intrusive location at which a facility to remedy an identified significant gap may be located, and the applicant has reasonably established a lack of potential alternative less intrusive sites and lack of sites available for co-location, (b) whether the specific location on the proposed portion of the selected site is the least intrusive portion of the site for the proposed installation (c) whether the height proposed for the facility is the minimum height actually necessary to remedy an established significant gap in service, (d) whether or not a pre-existing structure can be used to camouflage the facility and/or its antennas, (e) whether or not, as proposed, the installation mitigates adverse impacts to the greatest extent reasonably feasible, through the employ of Stealth design, screening, use of color, noise mitigation measures, etc., and/or (f) overall whether or not there is a feasible alternative to remedy the gap through alternative, less intrusive substitute installations, such as the installation of multiple shorter installation, instead of a single microcell facility.

#### (c) Finding of Effective Prohibition or Lack of Effective Prohibition

If when applying the evidentiary standards set forth in subparagraph (a) hereinabove, the Hearing Examiner affirmatively determines that the applicant has failed to establish either: (i) that an identified wireless carrier suffers from a significant gap(s) in its personal wireless services within the City, and/or (ii) that the applicant has failed to establish that the proposed installation is the least intrusive means of remedying any such gap or gaps, then the Hearing Examiner may deny the application pursuant to Section (b) hereinabove, and such denial shall not constitute an "Effective Prohibition."

If when applying the evidentiary standards set forth in subparagraph (a) hereinabove, the Hearing Examiner affirmatively determines that the applicant has established both: (i) that an identified wireless carrier suffers from a significant gap in personal wireless services within the City, and (ii) that the proposed installation is the least intrusive means of remedying such significant gap or gaps, then the Hearing Examiner shall grant the application, irrespective of any determinations the Hearing Examiner may make pursuant to Section (b) hereinabove, because any such denial would constitute an "effective prohibition."

#### §18.23.110 Retention of Consultants

#### 1. Use of Consultants

Where deemed reasonably necessary by the Hearing Examiner and/or the City, the Hearing Examiner and/or the City may retain the services of professional consultants to assist the Hearing Examiner in carrying out its duties in deciding special use permit applications for personal wireless service facilities. Where the Hearing Examiner uses the services of private engineers, attorneys, or other consultants for purposes of engineering, scientific, land use planning, environmental, legal, or similar professional reviews of the adequacy or substantive aspects of applications, or of issues raised during the course of review of applications for special use permit approvals of personal wireless service facilities, the applicant and landowner, if different, shall be jointly and severally responsible for payment of all the reasonable and necessary costs incurred by the City for such services. In no event shall that responsibility be greater than the actual cost to the City of such engineering, legal, or other consulting services.

#### 2. Advance Deposits for Consultant Costs

The City and/or Hearing Examiner may require advance periodic monetary deposits held by the City on account of the applicant or landowner to secure the reimbursement of the City's consultant expenses. The City Council shall establish policies and procedures for the fixing of escrow deposits and the management of payment from them. After audit and approval of itemized vouchers by the City Comptroller as to reasonableness and necessity of the consultant charges, the City may make payments from the deposited funds for engineering, legal or consultant services. Upon receiving a request by the applicant or landowner, the City shall supply copies of such vouchers to the applicant and/or landowner reasonably in advance of audit and approval, appropriately redacted where necessary to shield legally privileged communications between City officers or employees and the City's consultant. When it appears that there may be insufficient funds in the account established for the applicant or landowner by the City to pay current or anticipated vouchers, the City shall cause the applicant or landowner to deposit additional sums to meet such expenses or anticipated expenses in accordance with policies and procedures established by the City Council. Consultants shall undertake no review on any matter scheduled before the Hearing Examiner until the initial escrow deposit has been made or requested replenishment of the escrow deposit has been made. No reviewing

agency shall be obligated to proceed unless the applicant complies with escrow deposit requirements.

#### 3. Reasonable Limit Upon Consultant Expenses

A consultant expense or part thereof is reasonable in amount if it bears a reasonable relationship to the customary fee charged by engineers, attorneys, or planners within the region for services performed on behalf of applicants or reviewing Hearing Examiners in connection with comparable applications for land use or development.

The City may also take into account any special conditions for considerations as it may deem relevant, including but not limited to the quality and timeliness of submissions on behalf of the applicant and the cooperation of the applicant and agents during the review process.

A consultant expense or part thereof is necessarily incurred if it was charged by the engineer, attorney or planner, or other consultants, for a service which was rendered to assist the Hearing Examiner in: (a) making factual determinations consistent with the goals of protecting or promoting of the health, safety or welfare of the City or its residents; (b) assessing potential adverse environmental impacts such as those identified within a SEPA process; (c) accessing potential adverse impacts to historic properties, structures and/or districts, and/or (d) assessing and determining factual issues relevant to Effective Prohibition claims, as addressed herein, to enable the Hearing Examiner to best comply with the letter and intent of the provision of the TCA which is relevant thereto.

#### 4. Audits Upon the Request of an Applicant

Upon request of the applicant or landowner, the City Council shall review and audit all vouchers and determine whether such engineering, legal and consulting expenses are reasonable in amount and necessarily incurred by the City in connection with the review and consideration of a special use permit application for personal wireless service facility. In the event of such a request, the applicant or landowner shall be entitled to be heard by the City Council on reasonable advance notice.

#### 5. Liability for Consultant Expenses

For a land-use application to be complete, the applicant shall provide the written consent of all owners of the subject real property, both authorizing the applicant to file and pursue land development proposals and acknowledging potential landowner responsibility, under this section, for engineering, legal, and other consulting fees incurred by the City. If different from the applicant, the owner(s) of the subject real property shall be jointly and severally responsible for reimbursing the City for funds expended to compensate services rendered to the City under this section by private engineers, attorneys, or other consultants. The applicant and the owner shall remain responsible for reimbursing the City for its consulting expenses, notwithstanding that the escrow account may be insufficient to cover such expenses. No building permit or other permit shall be issued until reimbursement of costs and expenses determined by the City to be due. In the event of failure to reimburse the City for such fees, the following shall apply:

The City may seek recovery of unreimbursed engineering, legal, and consulting fees by court action in an appropriate jurisdiction, and the defendant(s) in such actions shall be responsible for the reasonable and necessary attorney's fees expended by the City in prosecuting such action.

Alternatively, and at the sole discretion of the City, a default in reimbursement of such engineering, legal and consulting fees expended by the City shall be remedied by charging such sums against the real property that is the subject of the special use permit application, by adding that charge to and making it a part of the next annual real property tax assessment roll of the City. Such charges shall be levied and collected simultaneously and in the same manner as City-assessed taxes and applied in reimbursing the fund from which the costs were defrayed for the engineering, legal and consulting fees. Prior to charging such assessments, the owners of the real property shall be provided written notice to their last known address of record, by certified mail, return receipt requested, of an opportunity to be heard and object before the City Council to the proposed real property assessment, at a date to be designated in the notice, which shall be no less than 30 days after its mailing.

#### §18.23.120 Setback Requirements

#### 1. Small Wireless Facilities

- (a) The minimum setback from any residential dwelling or structure shall be 150 feet within the Public Use (P-1) and Central Business (CB) Districts, unless the facility is being installed upon a pre-existing utility pole or other utility structure.
- (b) Within all residentially-zoned and other districts, all small wireless facilities shall be set back a minimum of 300 feet from any residential dwelling or structure, unless the facility is being installed upon a pre-existing utility pole or is being colocated upon a pre-existing personal wireless service facility.

## Cell Towers and all Personal Wireless Service Facilities that do not meet the definition of a Small Wireless Facility

- (a) Each proposed wireless personal service facility and personal wireless service facility structure, compound, and complex shall be located on a single lot and comply with applicable setback requirements. Adequate measures shall be taken to contain on-site all icefall or debris from tower failure and preserve the privacy of any adjoining residential properties.
- (b) Each lot containing a wireless personal service facility and personal wireless service facility structure, compound, and complex shall have the minimum area, shape, and frontage requirements generally prevailing for the zoning district where located, in the Schedules of Regulations for Nonresidential and Residential Districts of this Chapter, and such additional land if necessary to meet the setback requirements of this Section.

- (c) Cell towers and personal wireless service facilities that do not meet the definition of a small wireless facility, shall maintain a minimum setback of a distance equal to one hundred ten (110%) percent of the height of the facility, for front yard setbacks, rear yard setbacks and side yard setbacks, in all zoning districts.
- (d) In addition to the above required setbacks from property lines, Cell towers and personal wireless service facilities that do not meet the definition of a small wireless facility, shall maintain a minimum setback of 300 feet from any residential dwelling or structure in all zones.

#### §18.23.130 Height Restrictions

#### 1. Small Wireless Facilities

Personal Wireless Service Facilities which meet the definition of a small wireless facility shall not exceed a maximum height of 60 feet above ground elevation in the Public Use (P-1), and Residential Single Family 15000 (RS 15000) Districts, and shall not exceed a maximum height of 45 feet within all other zoning districts.

#### 2. Non-Small Wireless Facilities

Personal Wireless Service Facilities which do not meet the definition of a small wireless facility shall not exceed a maximum height of 150 feet above ground elevation in the Public Use (P-1) District, 100 feet above ground level in the Central Business (CB) and Residential Single Family 15000 (RS 15000) Districts, and 75 feet above ground level in all other zoning districts.

#### §18.23.140 Use Restrictions and Variances

#### 1. Use Restrictions by Application Type and Zoning District

#### Type I applications No Use Variance Required

Type I applications for co-location of a small wireless facility shall be a permitted use which shall not require a use variance, but shall require an applicant to obtain both a special use permit and site plan approval from the Hearing Examiner, and a building permit.

Such applications shall additionally require a variance if the proposed facility does not meet the setback requirements or height limitations set forth elsewhere in this Chapter 18.23 and its subdivisions. The applicant shall be required to submit an application for such variance to the Hearing Examiner. The Hearing Examiner shall thereafter make findings as required under Section 18.30.020, and shall then either (a) grant the application for a variance, or (c) deny the application for a variance.

## Type II applications No Use Variance Required Unless Determined Otherwise by Hearing Examiner

Type II applications for colocations of a wireless personal services facility, which do not meet the definition of a small wireless facility, shall require a special use permit, site plan approval, and a building permit, but shall not require a use variance, unless the Hearing Examiner, in his/her/their sole discretion, determines that the proposed colocation will increase the overall intrusiveness of the site to a sufficient extent that its presence would no longer be compatible with the surrounding properties and/or surrounding community, in which case the Hearing Examiner shall issue a decision determining that the applicant shall be required to obtain a variance in accord with Chapter 18.30.

In rendering a determination of whether or not a variance shall be required, the Hearing Examiner shall consider, among other things: (a) the physical size, number, and potential intrusiveness of each new item of equipment to be installed as part of the proposed colocation, (b) the extent to which the installation of such equipment is to require or effectuate a significant physical expansion of the size or area of the facility or complex, (c) the extent to which the addition of such additional equipment will likely increase the adverse aesthetic impact of the facility, and/or any other potentially significant adverse impacts which are likely to cause a significant increase in the overall intrusiveness of the wireless facility, and/or its compound or complex, such that it will no longer be reasonably compatible with the use of nearby or surrounding properties and/or that its presence would be incompatible with the character and use of the nearby properties and/or surrounding community.

If the Hearing Examiner determines that a variance is required for a specific proposed facility, then the applicant shall be required to file an application for a variance to the Hearing Examiner. The Hearing Examiner shall thereafter make findings as required under Section 18.30.020, and shall then either (a) grant the application for a variance, or (c) deny the application for a variance.

#### Type III Applications No Use Variance Required

Applications for installing new Small Wireless Facilities that meet the criteria for Type III applications shall be considered a special use permit use in all Districts. They shall require a special use permit, site plan approval and a building permit but shall not require a use variance.

Such applications shall additionally require a variance if the proposed facility does not meet the setback requirements or height limitations set forth elsewhere in this Chapter 18.23 and its subdivisions. The applicant shall be required to submit an application for such variance to the Hearing Examiner. The Hearing Examiner shall thereafter make findings as required under Section 18.30.020, and shall then either (a) grant the application for a variance, or (c) deny the application for a variance.

#### Type IV Applications Variance Requirements

Type IV applications seeking approval for the installation of a new cell tower and/or all other wireless facilities that are not a small wireless facility shall be a permitted use in Public Use (P-1), Central Business (CB), and Residential Single Family 15000 (RS 15000) Districts, which shall not need a use variance, but shall require a special use permit, site plan approval and a building permit.

Such applications shall additionally require a variance if the proposed facility does not meet the setback requirements or height limitations set forth elsewhere in this Chapter 18.23 and its subdivisions. The applicant shall be required to submit an application for such variance to the Hearing Examiner. The Hearing Examiner shall thereafter make findings as required under Section 18.30.020, and shall then either (a) grant the application for a variance, or (c) deny the application for a variance.

Type IV applications seeking approval for the installation of a new cell tower and/or all other wireless facilities that are not a small wireless facility in all districts other than a CB, NB or P-1 District, shall be a prohibited use which shall require a use variance, special use permit, site plan approval and building permit.

Such applications shall additionally require a variance if the proposed facility does not meet the setback requirements or height limitations set forth elsewhere in this Chapter 18.23 and its subdivisions. The applicant shall be required to submit an application for such variance to the Hearing Examiner. The Hearing Examiner shall thereafter make findings as required under Section 18.30.020, and shall then either (a) grant the application for a variance, or (c) deny the application for a variance.

#### §18.23.150 Environmental Impacts

If, and to the extent that, the Hearing Examiner determines a proposed installation bears the potential for a significant adverse impact upon the environment within the meaning of SEPA and/or the NEPA, then the Hearing Examiner shall be expected to comply with the requirements of SEPA in determining both (a) the extent of adverse impacts upon the environment and/or historic properties and (b) what mitigation measures the applicant should be required to undertake to minimize the adverse environmental impacts and/or adverse impacts upon historic sites, structures and/or districts.

If a respective applicant fails to obtain a review from the State of Washington Department of Ecology ("DOE") and/or NEPA and opinion letters from the DOE and the FCC pertaining to its proposed installation prior to a first public hearing before the Hearing Examiner for the respective application, then the Hearing Examiner may make direct requests to the DOE and the FCC for their review of the application. The \Hearing Examiner may request DOE and the FCC's review and input in completing the statutorily-required environmental impact analysis pursuant to SEPA and NEPA.

In addition, the Hearing Examiner shall comply with the statutory requirements of SEPA to complete a SEPA review, make determinations of significance, and where appropriate, require the applicant to complete a draft environmental impact statement, and if additionally appropriate, to thereafter complete a final environmental impact statement and analysis.

So long as the Hearing Examiner acts with reasonable diligence in completing its SEPA and NEPA review, if compliance with the statutory requirements for environmental review requires a period of effort that extends beyond the expiration of the applicable shot clock period, the delays beyond such period shall be deemed reasonable.

#### §18.23.160 Historic Site Impacts

The Hearing Examiner shall consider the potential adverse impacts of any proposed facility upon any historic site, district, or structure consistent with the requirements of the City's historic preservation law and comprehensive plan and SEPA.

If, and to the extent that, the Hearing Examiner determines that a proposed installation bears the potential for a significant adverse impact upon a historic site or a historic district within the meaning of SEPA and/or the NHPA (especially if the historic site at issue is listed upon the national register of historic places), then the Hearing Examiner shall comply with the requirements of both SEPA and City Municipal Code in determining both: (a) the extent of adverse impacts upon the historic properties, and (b) what mitigation measure might the applicant be required to undertake to minimize the adverse environmental impacts and/or adverse impacts upon historic sites, structures and/or district.

Should a respective applicant fail to obtain a DOE and/or a Section 106 review under NHPA, and opinion letters from DOE and the FCC pertaining to its proposed installation prior to a first public hearing before the Hearing Examiner for the respective application, then the Hearing Examiner shall make direct requests to DOE and the FCC for their review of the application. They shall request DOE and the FCC's review and input in completing the statutorily-required environmental/historic impact analysis pursuant to SEPA and NHPA.

This request shall include, but not be limited to, a request to the FCC for a Section 106 review, as defined in this Chapter, as the City recognizes each application for a special use permit for the installation of a personal wireless services facility shall constitute "an undertaking" for purposes of compliance with the National Historic Preservation Act.

In addition, the Hearing Examiner shall comply with the statutory requirements of SEPA to complete a SEPA review, make determinations of significance, and where appropriate, require the applicant to complete a draft environmental impact statement, and if additionally appropriate, to thereafter complete a final environmental impact statement and analysis.

So long as the Hearing Examiner acts with reasonable diligence in completing its SEPA and NHPA review, if compliance with the statutory requirements for historic preservation review requires a period of effort that extends beyond the expiration of the applicable shot clock period, the delays beyond such period shall be deemed reasonable.

#### §18.23.170 *Force Majeure*

In the event that the rendering of a final decision upon a special use permit application under this section is delayed due to natural and/or unnatural events and/or forces which are not within the control of the City or the Hearing Examiner, such as the unavoidable delays experienced in government processes due to the COVID 19 pandemic, and/or mandatory compliance with any related federal or state government orders issued in relation thereto, such delays shall constitute reasonable delays which shall be recognized as acceptable grounds for extending the period for review and the rendering of final determinations beyond the period allotted under the applicable shot clock.

#### §18.23.180 Eleventh Hour Submissions

In the event that an applicant tenders eleventh-hour submissions to the City and/or the Hearing Examiner in the form of (a) expert reports, (b) expert materials, and/or (c) materials which require a significant period for review due either to their complexity or the sheer volume of materials which an applicant has chosen to provide to the Hearing Examiner at such late point in the proceedings, the Hearing Examiner shall be afforded a reasonable time to review such late-submitted materials.

If reasonably necessary, the Hearing Examiner shall be permitted to retain the services of an expert consultant to review any late-submitted expert reports which were provided to the Hearing Examiner, even if such review or services extend beyond the applicable shot clock period, so long as the Hearing Examiner completes such review and retains and secures such expert services within a reasonable period of time thereafter, and otherwise acts with reasonable diligence in completing its review and rendering its final decision.

#### §18.23.190 Prohibition Against Illegally Excessive Emissions and RF Radiation Testing

As disclosed upon the FCC's public internet website, personal wireless services facilities erected at any height under 200 feet are not required to be registered with the FCC.

Of even greater potential concern to the City is the fact that the FCC does not enforce the RF radiation limits codified within the CFR by either: (a) testing the actual radiation emissions of Wireless Facilities either at the time of their installation or at any time thereafter, or (b) requiring their owners to test them. See relevant excerpts from the FCC's public internet website annexed as Appendix 2.

This means that when wireless Facilities are constructed and operated within the City, the FCC will have no idea where they are located and no means of determining, much less ensuring, that they are not exposing residents within the City and/or the general public to illegally excessive levels of RF Radiation.

The City deems it to be of critical importance to the health, safety, and welfare of the City, its residents, and the public at large that personal wireless service facilities do not expose members of the general public to levels of RF radiation that exceed the limits which have been deemed safe by the FCC, and/or are imposed under CFR.

In accord with the same, the City enacts the following RF Radiation testing requirements and provisions set forth herein below.

No wireless telecommunications facility shall at any time be permitted to emit illegally excessive RF Radiation as defined in §18.23.020, or to produce power densities that exceed the legally permissible limits for electric and magnetic field strength and power density for transmitters, as codified within 47 CFR §1.1310(e)(1), Table 1 Sections (i) and (ii), as made applicable pursuant to 47 CFR §1.1310(e)(3).

To ensure continuing compliance with such limits by all owners and/or operators of personal wireless service facilities within the City, all owners, and operators of personal wireless service facilities shall submit reports as required by this section.

As set forth hereinbelow, the City may additionally require, at the owner and/or operator's expense, independent verification of the results of any analysis set forth within any reports submitted to the City by an owner and/or operator.

If an operator of a personal wireless service facility fails to supply the required reports or fails to correct a violation of the legally permissible limits described hereinabove, following notification that their respective facility is believed to be exceeding such limits, any special use permit or other zoning approval granted by the Hearing Examiner or any other Hearing Examiner or representative of the City is subject to modification or revocation by the Hearing Examiner following a public hearing.

#### 1. Initial Certification of Compliance with Applicable RF Radiation Limits

Within forty-five (45) days of initial operation or a substantial modification of a personal wireless service facility, the owner and/or operator of each Telecommunications antenna shall submit to the City Planning Official a written certification by a licensed professional engineer, sworn to under penalties of perjury, that the facility's radio frequency emissions comply with the limits codified within 47 CFR §1.1310(e)(1), Table 1 Sections (i) and (ii), as made applicable pursuant to 47 CFR §1.1310(e)(3).

The engineer shall measure the emissions of the approved facility, including the cumulative impact from other nearby Facilities, and determine if such emissions are within the limits described hereinabove.

A report of these measurements and the engineer's findings with respect to compliance with the FCC's Maximum Permissible Exposure (MPE) limits shall be submitted to the City Planning Official.

If the report shows that the facility does not comply with applicable limits, then the owner and/or operator shall cease operation of the facility until the facility is brought into compliance with such limits. Proof of compliance shall be a certification provided by the engineer who prepared the original report. The City may require, at the applicant's expense, independent verification of the results of the analysis.

#### 2. Random RF Radiofrequency Testing

At the operator's expense, the City may retain an engineer to conduct random unannounced RF Radiation testing of such Facilities to ensure the facility's compliance with the limits codified within 47 CFR §1.1310(e)(1) et seq.

The City may cause such random testing to be conducted as often as the City may deem appropriate. However, the City may not require the owner and/or operator to pay for more than one test per facility per calendar year unless such testing reveals that one or more of the owner and/or operator's facilities are exceeding the limits codified within 47 CFR §1.1310(e)(1) et seq., in which case the City shall be permitted to demand that the facility be brought into compliance with such limits, and to conduct additional tests to determine if, and when, the owner and/or operator thereafter brings the respective facility and/or facilities into compliance.

The engineer conducting any such testing shall measure the emissions from such facilities, including, but not limited to, the emissions from any individual facility as well as the cumulative emissions from multiple transmitters/facilities which are placed upon the same supporting structure or nearby structures to ascertain whether or not such facility or facilities are individually or cumulatively exposing members of the general public to emissions which exceed the permissible General Population Exposure Limits, or Occupational Exposure limited, which have been set and/or approved by the FCC

If the City at any time finds that there is good cause to believe that a personal wireless service facility and/or one or more of its antennas are emitting RF radiation at levels in excess of the legal limits permitted under 47 CFR §1.1310(e)(1) et seq., then a hearing shall be scheduled before the Hearing Examiner at which the owner and/or operator of such facility shall be required to show cause why any and all permits and/or approvals issued by the City for such facility and/or facilities should not be revoked, and a fine should not be assessed against such owner and/or operator.

Such hearing shall be duly noticed to both the public and the owner and/or operator of the respective facility or facilities at issue. The owner and/or operator shall be afforded not less than two (2) weeks written notice by first-class mail to its Notice Address.

At such hearing, the burden shall be on the City to show that, by a preponderance of the evidence, the Facilities' emissions exceeded the permissible limits under 47 CFR §1.1310(e)(1) et seq.

In the event that the City establishes same, the owner and/or operator shall then be required to establish, by clear and convincing evidence, that a malfunction of equipment caused their failure to comply with the applicable limits through no fault on the part of the owner/operator.

If the owner and/or operator fails to establish same, the Hearing Examiner shall have the power to, and shall revoke any special use permit, variance, building permit, and/or any other form of zoning-related approval(s) which the Hearing Examiner, Hearing Examiner,

City Planning Official and/or any other representative of the City may have then issued to the owner and/or operator, for the respective facility.

In addition, the Hearing Examiner shall impose a fine of not less than \$1,000, nor more than \$5,000 for such violation of subparagraph 1. hereinabove, or, in the case of a second offense within less than five (5) years, a minimum fine of \$5,000, nor more than \$25,000.

In the event that an owner or operator of one or more personal wireless service facilities is found to violate subparagraph 1. hereinabove, three or more times within any five (5) year period, then in addition to revoking any zoning approvals for the facilities which were violating the limits codified in 47 CFR §1.1310(e)(1) et seq., the Hearing Examiner shall render a determination within which it shall deem the owner/operator prohibited from filing any applications for any new wireless personal services facilities within the City for a period of five (5) years.

#### §18.23.200 Bond Requirements, Removal of Abandoned Facilities and Reclamation

#### 1. Bond Requirement

At, or prior to the filing of an application for a special use permit for the installation of a new personal wireless service facility, each respective applicant shall provide a written estimate for the cost of the decommissioning and removal of the facility, including all equipment that comprises any portion or part of the facility, compound and/or complex, as well as any accessory facility or structure, including the cost of the full restoration and reclamation of the site, to the extent practicable, to its condition before development in accord with the decommissioning and reclamation plan required herein. The Hearing Examiner's engineer shall review this estimate.

Upon receiving a special use permit approval from the Hearing Examiner, and a building permit, prior to the commencement of installation and/or construction of such facility or any part thereof, the applicant shall file with the City a bond for a length of no less than three years in an amount equal to or exceeding the estimate of the cost of removal of the facility and all associated structures, fencing, power supply, and other appurtenances connected with the facility. The bond must be provided within thirty (30) days of the approval date and before any installation or construction begins.

Replacement bonds must be provided ninety (90) days prior to the expiration of any previous bond.

At any time the City has good cause to question the sufficiency of the bond at the end of any three-year period, the owner and/or operator of the facility, upon request by the City, shall provide an updated estimate and bond in the appropriate amount.

Failure to keep the bonds in effect is cause for removal of the facility at the owner's expense. A separate bond will be required for each facility, regardless of the number of owners or the location.

#### 2. Removal of Abandoned Facilities

Any personal wireless service facility that is not operated or used for a continuous period of twelve (12) consecutive months shall be considered abandoned. At the owner's expense, the owner of said facility shall be required to remove the facility and all associated equipment buildings, power supply, fence, and other items associated with such facility, compound and/or complex, and permitted with, the facility.

If the facility is not removed within ninety (90) days, the bond secured by the facility owner shall be used to remove the facility and any accessory equipment and structures.

#### §18.23.210 ADA Accommodations

The City of Langley seeks to comply with the Americans With Disabilities Act, and shall comply with same in the event that any person who is disabled within the meaning of the Act seeks a reasonable accommodation, to the extent that they are entitled to same under the Act.

#### §18.23.220 Siting Hierarchy

Consistent with smarting planning, the City adopts the following hierarchy of most preferred to least preferred zoning districts for the siting and installation of wireless facilities, which are as follows:

1st priority (most preferred) – Public Use District
2nd priority – Central Business District
3rd priority – Residential Single Family 15000
4th priority (least preferred) All other districts

#### §18.23.230 General Provisions

#### 1. Balancing of Interests

The City formally recognizes that, as has been interpreted by federal, when it enacted the TCA, Congress chose to preserve local zoning authority over decisions regarding the placement, construction, and modification of personal wireless facilities (47 U.S.C. §332(c)(7)(A)) subject only to the limitations set forth in subsection §332(c)(7)(b), consistent with the holding of the United States Court of Appeals in Sprint Spectrum L.P. v. Willoth, 176 F3d 630 (2<sup>nd</sup> Cir.1999), Sprint Telephony PCS LP v. City of San Diego, 543 F3d 571 (9<sup>th</sup> Cir. 2008); T-Mobile USA Inc. v. City of Anacortes, 572 F3d 987 (9<sup>th</sup> Cir. 2009), and their progeny, and the City has relied upon such federal courts' interpretations of the TCA in enacting this Chapter.

The City similarly embraces the federal courts' determinations that the TCA was created to effectuate a balancing between the interests of facilitating the growth of wireless

telephone service nationally and maintaining local control over the siting of wireless personal services facilities, as the Court additionally articulated in Omnipoint Communications Inc. v. The City of White Plains, 430 F3d. 529 (2<sup>nd</sup> Cir. 2005). This includes preserving to local governments, including the City, the power to deny applications for the installation of wireless personal services facilities, based upon traditional grounds of zoning denials, including, but not limited to, the potential adverse aesthetic impacts or a reduction in property values which the construction of any proposed structure may inflict upon nearby properties or the surrounding community.

This additionally includes the recognition that, under this balancing of interest test, "once an area is sufficiently serviced by a wireless service provider, the right to deny applications (for new wireless facilities) becomes broader" Crown Castle NG East LLC v. The Town of Hempstead, 2018 WL 6605857.

It is the intent of the City that this Chapter be applied in a manner consistent with the balancing of interests codified within the TCA.

Consistent with same, the City rejects and shall reject any current and/or future FCC interpretations of any provision of the TCA which are clearly inconsistent with, and/or are clearly contrary to, both the language of the TCA and binding decisions of the United States Court of Appeals.

This includes a rejection of any FCC interpretations inconsistent with Willoth and any claims that the FCA legally prohibits the Hearing Examiner from denying a special use permit application, based solely upon a claim that an applicant desires the installation of its new facility for "densification" of its existing personal wireless services, or to offer a new service, irrespective of whether or not the carrier already possesses adequate coverage within the City, and irrespective of the potential adverse impact which the installation of such new facility or facilities would inflict upon the City, its property owners, citizens and/or communities.

#### 2. Conflict With Federal or State Laws

To the extent that any provision of this Chapter is found to conflict with any applicable Federal or State law, it is the intent of the City that the remaining portion of this Chapter which has not been found to conflict with such law be deemed to remain valid and in full force and effect.



#### City of Langley

Planning Advisory Board

**To:** The Langley City Council

From: Greg Easton, Planning Advisory Board Chair

Meeting Date: July 6, 2022

**Subject:** Recommendation to the Langley City Council regarding proposed code amendments to section 18.01.040 of the Langley Municipal Code, definitions; repealing section 18.22.190 of the Langley Municipal Code, wireless communications facilities; adopting a new Chapter 18.23 of the Langley Municipal Code related to wireless communications facilities; providing for severability; and establishing an effective date

#### **SUMMARY**

During their meeting November 16, 2020, Council recommended staff evaluate and update the City's wireless code. The City of Langley wireless facilities ordinance is outdated with regards to regulations for modern technology and recent guidance. Local organization, Citizen League Encouraging Awareness of Radiation (CLEAR) has raised funds to allow the City to work with Mr. Andrew Campanelli, a professional in the legal field of wireless regulations. A contract has been signed with Mr. Campanelli, who has produced a new draft wireless code for the City. Staff worked with Mark Wahl of CLEAR to give the draft an initial review. After initial changes were addressed, the Planning Advisory Board (PAB) discussed the draft at their May and June meetings and recommend the Langley City Council adopt the proposed ordinance.

#### **FINDINGS**

- 1. In 1997, Langley Municipal Code ("LMC") Section 18.22.190, was adopted by Ordinance No. 754.
- 2. In the two and one-half decades since 1997, revolutionary changes have occurred in wireless technology, in public concerns about, and research findings on, wireless radiation's effects on living beings, and in judicial and legal understandings of the federal regulatory framework within which municipal authorities and wireless companies must operate and as such updates to Langley's regulatory framework are needed.
- 3. The recent introduction into the consumer market of the fifth generation ("5G") wireless technology, featuring shorter wavelengths that create bigger bandwidths to contain more data per second, and signals more tightly focused to a line directly aimed at, or reflected by, citizen equipment represents another current significant technical development.
- 4. The rollout of this technology with strong Federal funding involvement has accelerated the deployment of 5G networks nationwide.

- 5. 5G wireless technology are categorized as "small-cell" facilities often mounted on existing power poles, or on their own interconnected mini-towers, in a Distributed Antenna System (DAS).
- Wireless developers prefer these small-cell facilities to be more closely spaced with each other
  and with town structures, which can cause issues of property value, aesthetics, and
  neighborhood character to arise.
- 7. The PAB in its recommendation, seeks to minimize, to the greatest extent possible, any unnecessary adverse impacts caused by the siting, placement, physical size, and/or unnecessary proliferation of, personal wireless service facilities, including, but not limited to, adverse aesthetic impacts, adverse impacts upon property values, adverse impacts upon the character of any surrounding properties and communities, adverse impacts upon historical and/or scenic properties and districts, and the exposure of persons and property to potential dangers such as structural failures, ice fall, debris fall, and fire.
- 8. The PAB finds that, as has been interpreted by federal courts, when it enacted the federal Telecommunications Act of 1996 (TCA), Congress chose to preserve local zoning authority over decisions regarding the placement, construction, and modification of personal wireless facilities (47 U.S.C. §332(c)(7)(A)) subject only to the limitations set forth in subsection §332(c)(7)(b), consistent with the holding of the United States Court of Appeals in Sprint Spectrum L.P. v. Willoth, 176 F3d 630 (2nd Cir.1999), Sprint Telephony PCS LP v. City of San Diego, 543 F3d 571 (9th Cir. 2008); T-Mobile USA Inc. v. City of Anacortes, 572 F3d 987 (9th Cir. 2009), and their progeny, and the PAB has relied upon such federal courts' interpretations of the TCA in their recommendation to City Council.
- 9. The PAB similarly embraces the federal courts' determinations that the TCA was created to effectuate a balancing between the interests of facilitating the growth of wireless telephone service nationally and maintaining local control over the siting of wireless personal services facilities, as the Court additionally articulated in Omnipoint Communications Inc. v. The City of White Plains, 430 F3d. 529 (2nd Cir. 2005).
- 10. The PAB finds this to include preserving to local governments, including the City, the power to deny applications for the installation of wireless personal services facilities, based upon traditional grounds of zoning denials, including, but not limited to, the potential adverse aesthetic impacts or a reduction in property values which the construction of any proposed structure may inflict upon nearby properties or the surrounding community.
- 11. The PAB finds, consistent with the balancing of interests which the United States Congress intended to embed with the TCA, that Chapter 18.23 is intended to serve as a Smart Planning Provision, designed to achieve the four (4) simultaneous objectives of:
  - a. enabling personal wireless service providers to provide adequate personal wireless services throughout the City so that City residents can enjoy the benefits of same, from any FCC-licensed wireless carrier from which they choose to obtain such services, while
  - b. minimizing the number of cell towers and/or other personal wireless service facilities needed to provide such coverage,
  - c. preventing, to the greatest extent reasonably practical, any unnecessary adverse impacts upon the City's communities, residential areas, and individual homes, and

- d. complying with all of the legal requirements which the TCA imposes upon the City, when the City receives, processes and determines applications seeking approvals for the siting, construction and operation of cell towers and/or other personal wireless service facilities.
- 12. To achieve the objectives stated herein, the PAB recommends employing the "General Authority" preserved to the City under Section 47 U.S.C.A. §332(c)(7)(A) of the TCA to the greatest extent which the United States Congress intended to preserve those powers to the City, while simultaneously complying with each of the substantive and procedural requirements set forth within the subsections of 47 U.S.C.A. §332(c)(7)(B) of the TCA.
- 13. The PAB finds that deployment of small cell installations is known to have both positive and negative impacts on communities, some of the negative impacts can include:
  - a. Lowering the market value of property from which large or small cell installations can be seen;
  - b. Negatively affecting neighborhood and town character;
  - c. Posing threats to the public health, safety, and welfare through operating noise, or falling over or having falling parts in storm; and
  - d. Unsightly tree-trimming or tree/bush removal, as millimeter wave 5G signals can be blocked by foliage.
- 14. The PAB finds that this recommended code takes all of these concerns into account and prioritizes the "least intrusive" facility location possible.
- 15. The PAB finds that denser residential areas to be the least desirable location for wireless transmitting facilities due to negative impacts already stated, with public use districts and central business districts having a higher preference.
- 16. A Ninth Circuit Court judgment (Portland vs. FCC) affirmed that "intrusive" can include undesirable degradation of "aesthetics," and "village character."
- 17. The PAB finds protection of property values and personal safety as one of Langley's paramount obligations.
- 18. The PAB recognizes that permitting and yearly administration costs for Personal Wireless Service Facilities (PWSFs) are not specified in this code, they are in no way prevented by it and they are supported by the Federal Communications Commission (FCC).
- 19. 47 CFR 1 Section 332(c)(7) states there is a minimum "safe harbor" dollar amount the FCC supports without question for jurisdictions to charge for the permitting and yearly supervision of PWSFs; specifically it states, "reasonable [as of 2018] approximation of the state or local government's costs...related to and caused by the deployment" while excluding "excessive and arbitrary consulting fees or other costs"; additionally, the FCC adds that "a locality could prevail in charging fees that are above this level by showing that such fees are...(1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory;" and the FCC "recognizes local variances in costs."
- 20. The PAB finds inflation since 2018 has been considerable, so a higher amount for these costs is expected and would be documented by the permitting authority.

#### CONCLUSION

The City of Langley Planning Advisory Board has reviewed the proposed changes to the Langley Municipal Code, deliberated, and considered public hearing testimony, and hereby recommends that the Langley City Council adopt an ordinance to amend section 18.01.040 of the Langley Municipal Code, definitions; repeal section 18.22.190 of the Langley Municipal Code, wireless communications facilities; adopt a new Chapter 18.23 of the Langley Municipal Code related to wireless communications facilities; provide for severability; and establish an effective date.

Respectfully submitted through the Langley Com	munity Plann	ing & Building Departmer	nt to the Langley
City Council, pursuant to RCW 35A.63.020, this_	day of	, 2022 by,	
Greg Easton			
Chair, Langley Planning Advisory Board			

**Enclosures** 

Exhibit A – Amendments to Chapters 18.01 and 18.22 LMC and new Chapter 18.23 LMC



#### City of Langley

Planning Advisory Board

**To:** The Langley City Council

From: Greg Easton, Planning Advisory Board Chair

Meeting Date: August 3, 2022

Subject: Recommendation to the Langley City Council Regarding Proposed

Amendments to Chapters 13.01 and 13.50 of the Langley Municipal Code, Addressing Waivers of Utility Participation Fees and Connection Charges for Affordable Housing

Developments

#### **SUMMARY**

The Washington State Department of Commerce ("Commerce") received \$34.6 M in federal and state capital funds to fund sewer, water or stormwater improvements and/or waived system development charges for new affordable housing projects. The grant program established by Commerce was called the Connecting Housing to Infrastructure ("CHIP") grant program.

To be eligible, applicants must be a city, county, or public utility district in partnership with an affordable housing project. Additionally, applicants must be part of a city or county that imposed a sales and use tax for affordable housing. When the City of Langley ("City") submitted its CHIP grant applications January 7, 2022 and March 11, 2022, Island County ("County") had imposed a sales and use tax under RCW 82.14.540 (HB1406). This was technically not a new tax, but instead allowed the County to keep a portion of state sales taxes to fund affordable housing. More recently, the County also imposed a sales and use tax for affordable housing under RCW 82.14.530 (HB1590). This tax was a new, additional sales and use tax of one-tenth of one percent for funding of affordable housing and related housing services. Both of these taxes qualified the City of Langley to apply for grants under the CHIP program in partnership with local affordable housing project partners.

CHIP grants may be used for two purposes:

- To cover waived system development charges (locally, referred to as "participation fees" for the water utility and connection charges for the sewer utility) for new affordable housing projects; or
- 2. To fund sewer, water, or stormwater improvements needed to support new affordable housing projects.

Thus far, Commerce has opened two funding rounds for this grant, and a third is expected to open summer of 2022. For the first round, the City applied in partnership with Habitat for Humanity for the waiver of system development charges for their proposed Heron Park development ("Heron Park Project") and also applied with South Whidbey LLC for utility infrastructure funding for the proposed Coles Valley PUD ("Coles Valley PUD Project"). Neither application was awarded funding the first round. For the second round of funding, the City resubmitted applications for the Heron Park Project and the

Coles Valley PUD Project, and also submitted a third application in partnership with Tiny Homes in the Name of Christ ("THINC") for waived system development charges for their tiny home village on Camano Ave. ("THINC Project"). During the second round, the applications for the Heron Park Project and THINC Project were granted, and the projects were awarded funds (\$110,875 and \$70,245, respectively). The application for the Coles Valley PUD Project, however, was not awarded the requested funding.

RCW 35.92.380 established the ability for local jurisdictions to waive or delay collection of tap-in charges, connection fees, or hookup fees, also known as "system development charges," for low-income persons. The City currently does not have provisions for the waiving of system development charges for affordable housing development. Before signing the subject grant contracts with Commerce, the City must establish a fee waiver ordinance and formally waive the system development charges for the two awarded projects. Once the City waives the charges, the state grant funds can then be used to reimburse the City for the cost of waiving the fees.

The City utilities cannot always afford to subsidize affordable housing development through the waiving of system development charges. Staff confirmed with Commerce that the City's fee waiver ordinance may be structured so that any such fee waivers are contingent upon the availability of City funding to reimburse an affected utility. Adopting a fee waiver ordinance with this stipulation meets the State requirements to receive such grant funding.

Other requirements of the grant include:

- The new housing development must include at least 25% affordable units, which must have a strong probability of serving the target group for at least 25 years.
- The affordable units must be affordable to families and individuals with an income that is 80% of the area median income ("AMI") or below.
- Construction of affordable housing must begin within 24 months of grant award. Federal funds must be obligated by December 2024 and expended by December 2026; State funds have a tighter timeline.

#### **FINDINGS**

- 1. The Langley Municipal Code ("LMC") provides for the assessment of participation fees for the provision of water services under Chapter 13.01.
- 2. The LMC provides for the assessment of connection fees for the provision of sewer services under Chapter 13.50.
- 3. The Legislature, in 1980, authorized waiver or delay of system development charges for low-income persons (RCW 35.92.380).
- 4. The Washington State Growth Management Act ("GMA") adopted the following housing goal to guide development and adoption of comprehensive plans and development regulations for cities planning under the GMA:
  - a. Housing. Plan for and accommodate housing affordable to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock. RCW 36.70A.020(4).
- 5. The City of Langley's adopted Comprehensive Plan provides for the following policy to guide housing development in the City:
  - a. H-4.1 to explore innovative techniques that enable increased housing affordability including incentives such as reduced or waived connection fees.

- 6. Exemption from system development charges will enable low-income housing projects to become economically viable and produce more low-income housing units.
- 7. Exemption of system development charges is categorically exempt from review under the State Environmental Policy Act.
- 8. In accordance with RCW 36.70A.106, the City submitted its code amendments to the Commerce for an expedited review and received confirmation from the Commerce on \_\_\_\_\_\_, of receipt of the required notice.

#### **CONCLUSION**

The City of Langley Planning Advisory Board has reviewed the proposed changes to the LMC, deliberated, and considered public hearing testimony, and hereby recommends that the Langley City Council adopt an ordinance to adopt a new LMC Section 13.01.125 and to amend LMC 13.50.040 to provide for waivers of water and sewer utility participation fees and connection charges for affordable housing developments.

Respectfully submitted through the Langley Community Planning & Building Department to the Langley City Council, pursuant to RCW 35A.63.020, this \_\_\_\_\_ day of \_\_\_\_\_\_, 2022 by,

Greg Easton
Chair, Langley Planning Advisory Board

Enclosures:
Amendments to Chapters 13.01 and 13.50 LMC

<u>Section 2. New LMC 13.01.125, Adopted.</u> A new Langley Municipal Code Section 13.01.125, to be entitled ("Waiver of participation fees for low-income housing projects"), is here adopted to read as follows:

#### 13.01.125 Waiver of participation fees for low-income housing projects.

- A. Water participation fees for building permits for low-income housing may be waived as authorized by RCW 35.92.380.
- B. "Low-income housing," for purposes of rental housing, means housing for which the monthly housing expense of the tenant(s) is no greater than thirty percent (30%) of eighty percent (80%) of the area median family income (defined by HUD) adjusted for family size, for Island County, as reported by the United States Department of Housing and Urban Development.
- C. "Low-income housing," for purposes of home ownership housing, means for which the homeowner(s) monthly housing expense that is no greater than thirty-eight percent (38%) of one hundred percent (100%) of the area median family income (defined by HUD) adjusted for family size, for Island County, as reported by the United States Department of Housing and Urban Development.
- D. The grant of any waiver shall be conditioned upon the receipt by the City of grants or donations in an amount sufficient to reimburse the water utility for the amount of the waiver
- E. The grant of any such waiver shall also be conditioned upon a requirement that the property owner record a low-income housing covenant in a form approved by the City with the Island County Auditor. The covenant must run with the land and be binding on the owner(s), and their assigns, heirs and successors, and must:
  - 1. Prohibit use of low-income housing for any purpose other than for low-income housing, as defined in this section;
  - 2. Address price restrictions and household income limits for the low-income housing;
  - 3. Provide that if the low-income housing is converted to a use other than for low-income housing, the property owner must pay the applicable participation fees in effect at the time of conversion; and
  - Address reporting and monitoring requirements and any other topics related to the provision of low-income housing deemed necessary by the City.
- F. The City may, at its sole discretion, establish a monitoring fee for the low-income housing to cover the costs to the City to review and process documents and to take other steps reasonable or necessary to ensure compliance with low-income housing covenant or other provisions of this section.

<u>Section 3. LMC 13.50.040, Amended</u>. Langley Municipal Code Section 13.50.040 (Connection to permit issuance), is hereby amended as follows:

#### 13.50.040 Connection and permit issuance.

- A. A person may connect and discharge waste into the city wastewater system when: (1) they own property within the city limits, (2) said property is adjacent to and abutting the city's wastewater collection system, (3) when said property has not been assessed for any prior sanitary sewer improvement, and (4) after the public works department issues a valid permit.
- B. A permit shall issue for the service property upon the owner's written application but subject to the following terms and conditions:
  - 1. The applicant shall: (a) obtain all other related permits, (b) pay all city required fees, and (c) construct the connecting sewers in compliance with city requirements and specifications governing the same.
  - 2. The applicant shall pay the city in cash any other code-required sewer connection charges, prior to the issuance of any permit authorized in this section.
  - 3. All connection charges so received shall be considered wastewater system revenue.
  - 4. All city ordinances, rules, regulations and procedures, or any amendments thereof, relating to the use, maintenance and connection to the wastewater treatment system shall apply with equal force to such sewer connection.
- C. Waiver of connection charges for low-income housing projects.
  - 1. <u>Sewer connection charges for building permits for low-income housing may be waived per RCW 35.92.380.</u>
  - 2. "Low-income housing," for purposes of rental housing, means housing with a monthly housing expense that is no greater than thirty percent (30%) of eighty percent (80%) of the area median family income (defined by HUD) adjusted for family size, for Island County, as reported by the United States Department of Housing and Urban Development.
  - 3. "Low-income housing," for purposes of ownership housing, means housing with a monthly housing expense that is no greater than thirty-eight percent (38%) of one hundred percent (100%) of the area median family income (defined by HUD) adjusted for family size, for Island County, as reported by the United States Department of Housing and Urban Development.
  - 4. The grant of any waiver shall be conditioned upon the receipt by the City of grants or donations in an amount sufficient to reimburse the sewer utility for the amount of the waiver.
  - 5. The grant of any such waiver shall also be conditioned upon a requirement that the property owner record a low-income housing covenant in a form approved by the City with the Island County Auditor. The covenant must run

with the land and be binding on the owner(s), and their assigns, heirs, and successors, and must:

- a. <u>Prohibit use of the low-income housing for any purpose other than for low-income housing, as defined in this section;</u>
- b. Address price restrictions and household income limits for the low-income housing;
- c. Provide that if the low-income housing is converted to a use other than for low-income housing, the property owner must pay the applicable connection charges in effect at the time of conversion; and
- d. Address reporting and monitoring requirements and any other topics related to the provision of low-income housing units deemed necessary by the City.
- D. The City may, at its sole discretion, establish a monitoring fee for the low-income units to cover the costs to the City to review and process documents to maintain compliance with low-income restrictions of the covenant.



# City of Langley Housing Action Plan



MEREDITH PENNY

COMMUNITY PLANNING DIRECTOR

JULY 2022



## Tonight's Agenda

- 6pm Welcome & Respond to Poll
- 6pm-6:15pm Presentation
- 6:15pm-7pm Breakout Rooms Discussion
- 7pm-7:30pm Debrief as a Whole
- 7:30pm-8pm Q & A



## Background

- Received \$65,579 grant from Department of Commerce
- Create Housing Action Plan
- Undertake two action items from the plan

# What is a Housing Action Plan?



- Optional tool RCW 36.70A.600(2)
- Goal of plan:
  - Encourage construction of affordable and market rate housing
  - in a greater variety of housing types and
  - at prices accessible to greater variety of incomes,
  - including strategies aimed at for-profit single-family home market

# What needs to be included?

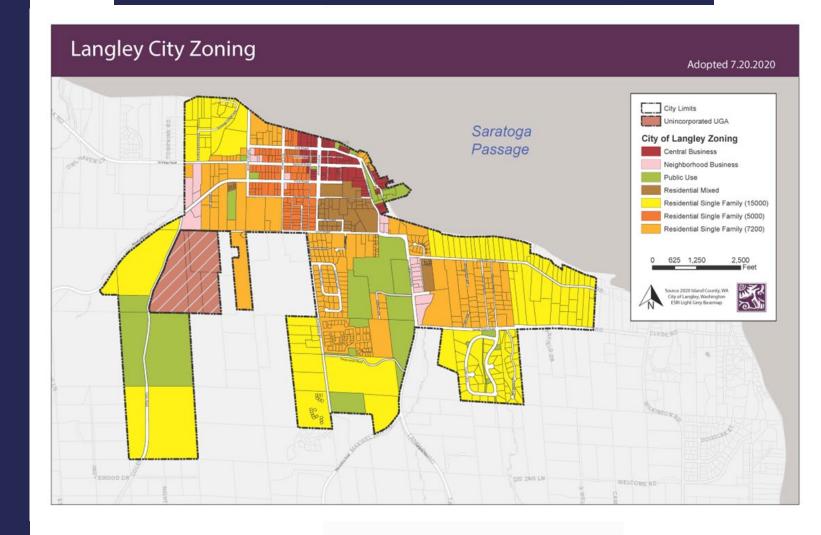


- Existing and projected housing needs
   for all incomes
- Strategies to increase housing supply and variety of housing types
- Population and employment trends
- Strategies to minimize displacement
- Evaluate success of attained goals in current housing element
- Public participation
- Schedule for implementing the action plan



# Where will these actions be focused?

- Only have authority over what happens in the City limits of Langley
- Actions taken may help address the greater housing needs of the south Whidbey region
- Will coordinate with others like Island County where we can achieve a common goal



# What has the City done already to address housing issues?

2018 Update of Comprehensive Plan	2019 Amendments to Zoning Code	2021 PUD Code and Multi-family Infill	2021 Community Meetings on Housing
Housing survey sent to utility ratepayers	Duplexes in all residential zones	PUD Code – allowed for creative development of large undeveloped parcels	Housing Challenges Report
Updates to Housing Element	More allowances for ADUs	Multi-family Infill – allowed for higher density housing types within smaller existing undeveloped lots	Meeting 1 – Housing Challenges
	Allowance of tiny homes as ADUs or in village-style		Meeting 2 – Tools and Strategies

# Foundation for HAP



112 Second Street P.O. Box 366 Langley, WA 98260 (360) 221-4246

City of Langley Affordable Housing Challenges Report

Prepared by:

PLANNING ADVISORY BOARD
AFFORDABLE HOUSING WORKING GROUP

Working Group Members:

Scott Chaplin, Mayor

Brigid Reynolds, former Planning Director

Rhonda Salerno, Planning Advisory Board Chair

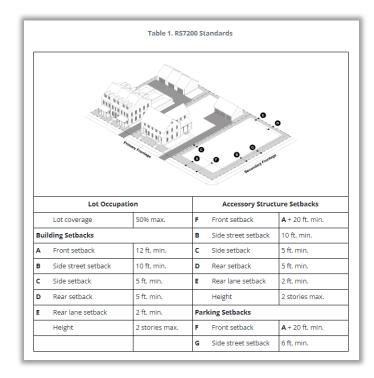
Rose Hughes, former Deputy Clerk-Treasurer

Greg Easton, Planning Advisory Boardmember



Housing Element





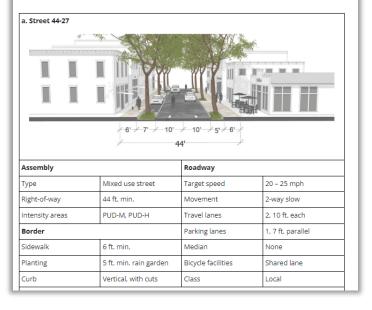


Table 2. PUD Street Cross-Sections

# **Key Steps**



# **Existing Conditions**

- Previous City documentation
- Regional and local housing trends
- Key programs and policies



# **Needs Assessment**

- Conditions affecting housing demand
- Barriers and Opportunities



# **SEPA Thresholds**

- Existing environmental protections
- Codes in place to mitigate impacts
- Investigate potential to raise thresholds



# **Housing Action Plan**

- Incorporate feedback
- Refine strategies



# **Inclusionary Zoning**

- Income-restricted units included in development
- Voluntary vs. mandatory
   Development feasibility under different scenarios

# **Outreach Timeline**







PHASE I INFORM

Q2 & Q3 - 2022

COMMUNITY SURVEY

LIVE!

PHASE II

NEEDS

ASSESSMENT

Q3 & Q4 - 2022

PHASE III
ACTION ITEMS

Q4 2022, Q1 & Q2 - 2023 PHASE IV FINALIZE HAP

Q1 & Q2 - 2023

**DUE**: JUNE 30, 2023

# **Outreach Methods**



- Community/Interest groups
- Council/PAB/City Commissions
- Community Meetings
- Survey
- Posters and Doorhangers
- Website
- Email Distribution List



# How can you help?

- Relay your experiences and those of others who have run into housing issues
- Review materials produced by staff and consultants on our website: <a href="https://bit.ly/LangleyHAP">https://bit.ly/LangleyHAP</a>
- Continue to attend the community meetings to provide your input at key decision points
- Spread the word about the project and how people can get involved
- Sign up for our email list to get updates: https://bit.ly/Langleyemailsubscribe

And don't forget to respond to our survey!

**LINK HERE** 



# **Discussion Questions**

# Thank you

Project Page: <a href="https://bit.ly/LangleyHAP">https://bit.ly/LangleyHAP</a>

Sign-Up for Email Distribution List: <a href="https://bit.ly/Langleyemailsubscribe">https://bit.ly/Langleyemailsubscribe</a>

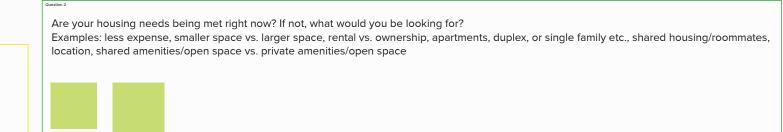
Housing Survey: **LINK** 

Langley Housing Action Plan Community Meeting July 21, 2022

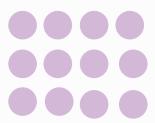
# **Breakout Room 1 Notes**

uestion 1

Do you have a story to share, about your housing experience? Or a story of someone you know? (avoid using specific names or addresses)







Question 4

What role should the City play in helping to meet these housing needs? Which of these roles should the City prioritize?

egulatory Incentives	Regulations/Requirements	Funding/Financial Incentives	Property Acquisition

Example: increased density, increased height, decreased setbacks, or decreased parking in exchange for affordable housing Example: housing developments of a certain size must include some income-restricted units Example: multi-family tax exemption, property tax levy, real estate excise tax, utility connection fee waivers/deferals

Example: city purchase property or use surplus property, issue RFP for non-profit to construct and operate affordable housing



# **Draft Housing Action Plan Survey Questions** – To be online and paper format

- 1. I live in (select the location of your primary residence):
  - Langley City Limits (see map if unsure)
  - o Langley, 98260 Zip code
  - o Clinton, 98236 Zip code
  - o Freeland, 98249 Zip code
  - o Greenbank, 98253 Zip code
  - o Coupeville, 98239 Zip code
  - o Oak Harbor, 98277 & 98278 Zip code
  - o I don't live on Whidbey Island

# 2. I work in:

- Langley City Limits (see map if unsure)
- o Langley, 98260 Zip code
- o Clinton, 98236 Zip code
- o Freeland, 98249 Zip code
- o Greenbank, 98253 Zip code
- o Coupeville, 98239 Zip code
- o Oak Harbor, 98277 & 98278 Zip code
- I don't work on Whidbey Island
- I am retired
- I attend school full time
- My place of work is in a different location than where I live, but I primarily work remotely from home
- Not currently in the labor force
- 3. If you live on Whidbey Island, how long have you lived here?
  - o 0-5 years
  - 5-10 years
  - o 10-20 years
  - o 20 or more years
  - I don't live on Whidbey Island
- 4. What kind of household are you a part of?
  - Single adult, living alone
  - Single adult, living with roommates
  - Family, never had children
  - o Family, with children under 18 living at home
  - o Family, with adult children who moved away
  - o Multi-generational family, with two or more generations of adults
  - Two or more unrelated families sharing a home
  - Other, please specify
- 5. What is your household size?
  - o 1 person
  - o 2 people
  - o 3 people
  - o 4 people

- o 5 people
- o 6 people
- o 7 people
- o 8 people
- o 9 people
- o 10 or more people
- 6. What type of housing do you live in?
  - Single Family Residence
  - Townhouse/Duplex/Triplex
  - Apartment (in a building with four or more total units)
  - Accessory Dwelling Unit (mother-in-law apartment or backyard cottage)
  - Mobile/Manufactured Home
  - o Condominium
  - No permanent/stable housing
  - Other, please specify
- 7. What is your current housing status?
  - o I am a homeowner
  - o I am a renter
  - o I am experiencing homelessness
  - I live with others who pay for my housing
- 8. What is your age?
  - Younger than 14
  - 0 14-18
  - 0 19-25
  - o **26-35**
  - 0 36-45
  - 0 46-55
  - 0 56-67
  - o Older than 67
- 9. What is your gender?
  - o Female
  - Male
  - Non-Binary
  - Prefer to self-describe
- 10. What is your race/ethnicity?
  - Asian
  - o Black or African American
  - Hispanic or Latino
  - Native American or Alaska Native
  - o Native Hawaiian or other Pacific Islander
  - o White
  - o Other, Two or More, Self-Describe
- 11. What is your household annual income?
  - Less than \$20,000

- o \$20,000 \$34,999
- o \$35,000 \$49,999
- \$50,000 \$74,999
- o \$75,000 \$99,999
- o \$100,000 \$149,999
- o \$150,000 \$199,999
- o \$200,000 or more
- 12. What percentage of your monthly household income do you spend on shelter (mortgage or rent) including other related costs such as utilities and home insurance?
  - o Less than 30%
  - o 30%
  - o 30% to 50%
  - More than 50%
  - Unsure/don't know
- 13. Did you face challenges when looking for your most recent home and if yes, what was the biggest challenge?
  - Cost to purchase a home
  - Limited number of available homes to purchase
  - Cost to rent a home
  - o Limited number of available homes for rent
  - Both cost and limited availability were the biggest challenge
  - Available homes did not fit my needs, please specify
  - Other, please specify
  - Did not face challenges
- 14. Are you satisfied with your current living conditions?
  - Very satisfied
  - Somewhat satisfied
  - Satisfied
  - Somewhat unsatisfied
  - Unsatisfied
  - Very unsatisfied
- 15. If you responded as unsatisfied in question number 13 above, what are the reasons? (select all those that apply)
  - The size of my home is too small
  - The size of my home is too large
  - o Currently sharing housing and would prefer not to
  - Living alone and would prefer to share
  - Quality of my home is unsatisfactory
  - o The cost is too high
  - o Requires too much maintenance
  - Don't like the location
  - Other, please specify
- 16. Are you currently looking for housing?
  - Yes

- Not right now, but maybe within the next year
- o No
- 17. If you answered yes to question number 15 above, how many bedrooms would you be looking for?
  - Studio (living space and bedroom combined)
  - One bedroom
  - Two bedrooms
  - Three bedrooms
  - More than three bedrooms
- 18. Are housing challenges affecting your ability to stay in the City of Langley or on Whidbey Island?
  - Yes, affecting my ability to stay in Langley
  - Yes, affecting my ability to stay on Whidbey Island
  - o I do not currently live in Langley or on Whidbey Island
  - Not affecting my ability to stay in Langley or on Whidbey Island
  - I am not experiencing housing challenges
- 19. If you responded yes to question 17 above, what are the primary issues?
  - Housing costs
  - Unable to find housing
  - Both cost and limited available housing
  - Other, please specify
- 20. What are your highest priorities when looking for housing? Choose your top 5 (please respond even if you are not currently looking)
  - Affordability/price
  - Square footage
  - Number of bedrooms
  - Number of bathrooms
  - o Private amenities (kitchen, laundry, garage, garden shed etc.)
  - Shared amenities (kitchen, laundry, garage, garden shed etc.)
  - Private open space/yard
  - Shared, community open space
  - Design (color, siding, windows, architecture, landscaping etc.)
  - Views
  - Privacy/quiet
  - Lively neighborhood/community
  - No shared entry
  - No shared walls
  - Elevator/wheelchair access
  - Number of parking spaces
  - Location of parking spaces
  - Views
  - Near schools
  - Walking distance to businesses and other services
  - Near transit
  - Near people you know

- 21. Langley's housing stock is predominately, and increasingly single family detached homes. What other housing choices should be available in Langley? (select all that apply)
  - Accessory Dwelling Units (mother-in-law apartment or backyard cottage)
  - Cottage Developments (multiple, single family residences, built around a central green space)
  - Tiny Home Villages (multiple, tiny, 150-400sqft, detached homes built around a central green space)
  - Mobile/Manufactured Homes
  - Townhomes
  - Duplexes
  - Triplexes
  - Live/Work Spaces (units that can be used to operate a business out of one's home)
  - One Story Apartment Buildings
  - o Two Story Apartment Buildings
  - Three Story Apartment Buildings
  - o Condominiums
  - Boarding Houses (individual rooms rented in a shared house)
  - o More Single-Family Detached Residences, in addition to what the City already has
  - Other (please specify)
  - The current housing supply works well
  - Don't know/not sure
- 22. If you are a homeowner, what would prevent you from building an Accessory Dwelling Unit (mother-in-law apartment of backyard cottage)?
  - Too expensive to build
  - Approval for an ADU takes too much time
  - Too complicated/I don't know where to start
  - I don't want an ADU
  - My property is too small
  - I can't fit the required parking on my property
  - I do not want to be a landlord
  - o I am not a homeowner
- 23. What are the top three housing priorities that are most important for the City to address in the Housing Action Plan?
  - Expanding access to homeownership
  - More affordable rental housing
  - Increasing the housing supply overall
  - Increasing the variety in housing options
  - Providing more family-sized housing units
  - Providing more small housing units
  - Providing emergency housing options (temporary housing for up to 60 days for individuals or families who are homeless or at imminent risk of becoming homeless)
  - Providing transitional housing options
     (temporary housing for up to two years for homeless individuals or families whose

- primary purpose is to enable homeless individuals or families to move into independent living and permanent housing)
- Providing supportive housing options (permanent stable housing with ongoing supportive services i.e. support for addictions, mental health, education, training, life skills, etc.)
- Increasing tenant protections for renter households
- o Preventing displacement of lower income residents
- Addressing social inequity
- Finding ways to keep existing housing in good condition
- o Creating more environmentally sustainable housing
- More high amenity rental housing
- Other (please specify)
- 24. Should the City consider allowing increased density (number of units on a lot) and/or increased height for housing developments that are guaranteed to be affordable (income-restricted)?
  - Yes, the City should allow increased density and/or height for housing developments that are guaranteed to be affordable
  - No, the City should not allow increased density and/or height for housing developments that are guaranteed to be affordable
  - Unsure/Don't know
- 25. Should the City consider encouraging or requiring housing developers to include some affordable (income-restricted) housing units within their market-rate housing developments?
  - The City should <u>encourage</u> housing developers to include some affordable (incomerestricted) housing units within their market-rate housing developments
  - The City should <u>require</u> housing developers to include some affordable (incomerestricted) housing units within their market-rate housing developments
  - The City should <u>neither encourage nor require</u> housing developers to include some affordable (income-restricted) housing units within their market-rate housing developments
  - Unsure/Don't know
- 26. Do you have a housing story to tell? Share it below. Use the questions below as prompts or ideas to help write your story. Why do you live in Langley or on Whidbey Island? What do you like about living here? What housing challenges have you faced?



# City of Langley

Planning Department

To: The Langley Planning Advisory Board

From: Meredith Penny, Community Planning Director

Meeting Date: July 6, 2022

**Subject:** Update on Active Permit Applications

# **Update on Permit Applications**

### a. Land Use Permits

### i. Active Land Use Permits

Boundary Line Adjustment – 1 Site Plan Review – 2 Shoreline Permit – 1 Critical Areas Permit - 1 Tree Removal – 1

# A. Nest Cottage Development - BSP-21-001 - 673 Third St

This permit application was to demolish an existing duplex and construct 9 units under the multifamily infill code. The nine units were to be sold as airspace condominiums and includes 5 cottage units and two duplexes. Staff issued the preliminary binding site plan decision on this first project developed under the multifamily infill code. Staff have since communicated with the applicant who is choosing not to pursue the Binding Site Plan further. Instead, they have submitted a boundary line adjustment, BLA-22-001 to adjust the boundaries between three parcels in the RS5000 zone: S57345-00-01004-0 (Parcel A), S57345-00-01017-0 (Parcel B), and S57345-00-01018-0 (Parcel C). The proposal is to convey 373 square feet from Parcel B to Parcel C and 1,967 square feet from Parcel B to Parcel A. The area of Parcel A is proposed to increase from 7,341 square feet to 7,714 square feet. The area of Parcel B is proposed to decrease from 7,341 square feet to 5,000 square feet. Parcel C is proposed to increase from 7,341 square feet to 9,308 square feet. Staff are currently waiting on corrected drawings to address an identified setback issue. Once the BLA permit is issued, the applicants intend to develop each of the remaining three parcels separately with single family residences and associated ADUs.

# B. 2<sup>nd</sup> St Cabins – SPR-22-001 – S3745-00-03004-0

A pre-application conference was held on February 1st with the applicant to discuss their proposal for the construction of three cottage housing units under the new multi-family infill code. The permit application has been submitted. A type 1 Site Plan Review is required, which includes a public comment period. The public comment period concluded April 30th. Staff are currently waiting for the submittal of additional information requested.

### C. Site Plan Review - 301 Anthes Ave

Staff recently received a permit application from the Langley united Methodist Church requesting to place a tiny home of 8' by 10' on a moveable trailer on site for temporary housing of an individual experiencing homelessness. RCW 35A.21.360 restricts the extent to which local jurisdictions can regulate religious organizations hosting the homeless, outside of basic health and safety requirements. Staff issued a letter of incomplete application, citing the need for more information regarding the provision of water, heat, and electricity, and the disposal of grey and black water and solid waste.

### D. Tree Removal – 316 Noblecliff Pl

On the Saturday of June 18, 2022 the Noblecliff neighborhood experienced a bluff slide that left a Douglas Fir tree (Tree 1) with exposed roots and the potential to fall at any moment. Tree 1 was located next to and just down the bluff from another, larger Douglas Fir tree (Tree 2), which was frequently used as a perch by a pair of eagles. The roots of the two trees were intertwined and there was a risk that if Tree 1 were to fall, it would bring Tree 2 with it. The HOA and property owners were hoping to save Tree 2 by proposing the removal of Tree 1. If Tree 2 were to fall, it would take much more of the bluff away with it.

On June 23<sup>rd</sup>, staff met the HOA and property owners on site and discussed the tree removal proposal with their arborist and geotechnical consultant. The HOA submitted for a tree removal permit and staff granted emergency authorization to remove Tree 1 per the Geotech and arborist's guidance, pending full written reports to be submitted after-the-fact.

On June 29<sup>th</sup>, the HOA notified staff that the bluff failed during the removal process of Tree 1 and both Tree 1 and Tree 2 fell, along with another portion of the bluff. No individuals were injured. The HOA will be consulting further with their geotechnical specialist about bluff restoration strategies and will be in touch with staff before further action is taken.

# E. Critical Areas Permit – 851 Saratoga Rd

The applicant is proposing the construction of a single-family residence, attached garage, deck, and septic system on a parcel that contains portions of a regulated wetland. The applicants have submitted a wetland report with their critical areas application. The report notes that the property is entirely encumbered between the portions of category III wetland and the associated 110 buffer. The property currently contains an uninhabitable dilapidated existing single-family residence with attached deck, a gravel driveway, a concrete pad, and other associated infrastructure. The project is proposed to be located further from the from the wetland boundary than the closest portion of the existing site development and the applicant proposes to reduce the amount of impervious surfaces on site. Staff are working to issue a letter of complete application, which will start the permit review process.

### F. Recent Design Review Board Decisions

The Design Review Board during their May meeting on the 17<sup>th</sup> considered and approved with conditions a sign permit at 220 2<sup>nd</sup> St, a sign permit at 221 2<sup>nd</sup> St, a sign permit, landscaping, and lighting plan for 105 1<sup>st</sup> St, and new park furniture for Boy and Dog Park. At their June meeting on the 15<sup>th</sup>, the Design Review Board approved a sign permit at 115 Anthes Ave.

# ii. Anticipated Land Use Applications

# A. Coles Valley Planned Unit Development (PUD) - Coles Rd - R32904-194-4850

The Coles Valley PUD project proponents have conducted the three steps that are required under the code before they can submit a formal application. Specifically, they have held a pre-application conference with staff in September 2021, held a community meeting in November 2021, and then provided an informational presentation to PAB at their February 2022 meeting. The next step for the applicants is to compile all the staff, public, and commission feedback they have received and consider how to address the feedback in their formal application. Staff are anticipating a formal application from the applicants to come soon. In anticipation of this application submittal, staff have held several informational workshops with Council on March 21st, March 28th, April 11th, and May 4th. At Council's April 18th meeting, the Ad Hoc Affordable Housing Advisory Committee presented their recommendations to Council on the affordability requirements that should be incorporated into the proposed Coles Valley PUD. At their June 6<sup>th</sup> meeting, Council directed staff to include several items in the first draft of the development agreement, as a starting point for negotiations once a formal application is received. The PAB does not play a formal role in the PUD review process but can provide individual comments during the 14-day comment period or in front of the Hearing Examiner during the public hearing. The staff presentation which addresses a number of frequently asked questions can be found on the City's website here.

# B. Saratoga Creek Restoration – 40 Saratoga Creek Ln

Saratoga Creek is one of the higher quality and less-disturbed creeks in the City limits. After crossing under Saratoga Rd, the creek follows a deep and natural ravine until the last roughly 300ft, when it enters a privately-owned and undersized culvert before reaching the Sound via an outfall.

Derek Marks, the Timber, Fish, and Wildlife Manager for the Tulalip Tribes is leading an effort to restore Saratoga Creek in this location, by preparing both a grant funding request and an application to be submitted to Fish and Wildlife for the project. This would involve the removal of the culvert, habitat enhancement, and construction of a protective structure to protect the road and bank.

As a fish habitat enhancement project, a local shoreline permit is not required. Rather the project would be processed through a Joint Aquatics Resources Permit Application (JARPA) filed with the Department of Fish and Wildlife requesting a Hydraulic Project Approval. The City can provide comments on the project during the comment period for the JARPA application.

Staff, Mayor Chaplin, and Derek Marks have been cooperating on conducting outreach to all the private property owners who own sections of the culvert, to gauge their interest in participating in the project.

### C. Heron Park, Habitat for Humanity – 3rd St

Habitat for Humanity is proposing a seven-unit development at the property they own off of 3rd St. The proposed development which is being referred to as Heron Park, is proposed to consist of three duplexes and one single family unit. All units are proposed as affordable housing home ownership. Habitat for Humanity recently received a \$875,000 direct appropriation from legislature through the State Housing

Trust Fund. The City of Langley also jointly applied for a grant for funding to cover the utility participation fees for the development through the State Department of Commerce Connecting Housing to Infrastructure Program (CHIP). The City was awarded the grant in the amount of \$110,876. The next step before the grant contract can be singed, is to develop and adopt a participation fee waiver ordinance. Since the project is receiving SHOP funds, staff are also coordinating the Environmental Assessment process which is required for all HUD-funded projects. Once funded, the project will have to apply for a Type I administrative site plan and SEPA review.

# b. Active Building Permits

# i. 325 Warf St - BD-21-002, BSFN-21-002, and BSFNADU-21-001

Staff have received several inquiries regarding a current building permit at 325 Warf St. On July 6, 2021, the Langley Hearing Examiner issued a final decision on application SDP-21-001 for a Shoreline Substantial Development Permit, Shoreline Conditional Use Permit, and Shoreline Variance to demolish an existing residence and construct a 2,700 square foot, two-story, single-family residence, and an 865 square foot garage with an accessory dwelling unit on the upper level, on a 0.54-acre property located at 325 Warf St.

As part of the application, the following reports were also included:

- Civil Drawings,
- Drainage Report,
- FEMA Floodplain Habitat Assessment,
- Flood Hazard Storage Calculation Report,
- Geotechnical Report,
- Draining and Grading Plan,
- Critical Areas and Shoreline Report, and
- Arborist Reports.

A Shoreline Substantial Development Permit was required because the proposed ADU did not fall under any of the exemptions of WAC 173-27-040. A Shoreline Conditional Use Permit was required because the City's SMP does not specifically list an ADU as a permitted or prohibited use. Finally, a Shoreline Variance was required to allow the proposed residence and associated garage/ADU to be constructed within the buffer associated with an on-site steep slope.

Chapter 15.24 LMC provides regulations applicable to development within flood hazard areas, including regulations requiring that new residential structures be elevated one foot or more above the Base Flood Elevation (BFE). The applicants proposed to construct the new single-family residence more than two feet above the BFE and the ADU more than 24 feet above the BFE. The Flood Storage Calculation Report found that the project would provide an increase in available floodwater storage, as compared to existing conditions, by elevating the new residential structure above the BFE.

A minimum 50-foot buffer and additional 15-foot building setback from the toe of Cascade Bluff is required under the City's critical areas ordinance, as adopted in the City's SMP. The City's SMP does state that residential structures may be located in geologically hazardous areas, only if a geotechnical evaluation has been prepared and deemed acceptable by the Shoreline Administrator. The geotechnical report submitted by the applicant, determined that a proposed retaining wall along the southwest side of the proposed residence and associated garage/ADU would be sufficient to provide protection for the structures and that, therefore, the proposed location of the new structures, on pin pile foundation elements at the toe of Cascade Bluff, would be appropriate. The report provided recommendations for site development and foundation design to which the Applicant would adhere.

The Applicant proposed to enhance 1,065 square feet of the shoreline buffer by removing invasive vegetation and planting native species. In the submitted Arborist Reports, the removal of a hazardous Big Leaf Maple tree on the property was recommended. The Applicant proposed to reduce the height of the tree to approximately 10 to 15 feet so that the remaining standing snags would provide future bird habitat. As mitigation for the loss of ecological functions provided by the tree, the Applicant would plant three replacement trees on the property, northeast of the existing hazard tree. The Applicant's Critical Areas and Shoreline Report determined that the proposed development and vegetation management measures would exceed ecological industry standards and would result in no net loss of shoreline ecological functions.

The City's SMP requires new residential development proposals to provide a drainage plan demonstrating compliance with the requirements of the 2019 Stormwater Management Manual for Western Washington. The applicant's Drainage Report recommended that all stormwater from impervious surfaces would fully infiltrate on-site. Stormwater runoff from roof areas would be tightlined through roof downspouts into three separate DOE-approved downspout infiltration drywell systems. Runoff from the driveway would sheet flow toward the beach in a manner mimicking the existing conditions of the site. The Drainage Report also noted that the temporary erosion and sediment control measures for the project would comply with the requirements of the 2019 Stormwater Management Manual for Western Washington.

Staff have included the final decision from the Hearing Examiner for members of the Planning Advisory Board and public who would like to review more details of the project. The applicant's building permits were issued on May 25, 2022, and they have begun the site prep and foundation work.

# ii. Building Permits as of 7/1/22

Single Family New: 11 Single Family Remodel: 13

New ADU: 4

New Commercial: 1 Commercial Remodel: 7 Tenant Improvement: 1

Total Active Projects: 37 (does not include over-the-counter permits)

# BEFORE THE HEARING EXAMINER FOR THE CITY OF LANGLEY

In the Matter of the Application of		No. SDP-21-001	
	)		
Alan Armstrong, Strongwork Architecture,	)		
on behalf of Rebecca McLemore	)		
	)		
For a Shoreline Substantial Development Permit,	)		
Shoreline Conditional Use Permit, and	)	FINDINGS, CONCLUSIONS,	
Shoreline Variance	)	AND DECISION	

# SUMMARY OF DECISIONS

The request for a Shoreline Substantial Development Permit, a Shoreline Conditional Use Permit, and a Shoreline Variance to construct a 2,700 square foot, two-story, single-family residence, and an 865 square foot garage with an accessory dwelling unit on the upper level, on a 0.54-acre property located at 325 Wharf Street, is **APPROVED**. Conditions are necessary to mitigate specific impacts of the proposal.

# **SUMMARY OF RECORD**

# Hearing Date:

The Hearing Examiner held an open record hearing on the requests on June 21, 2021, using remote access technology.

# Testimony:

The following individuals presented testimony under oath at the open record hearing:

Brigid Reynolds, City Director of Community Planning Alan Armstrong, Applicant Representative Danny Ochoa Scott Spooner Charles Pancerzewski Duane Den Adel Rebecca McLemore, Applicant

# Exhibits:

The following exhibits were admitted into the record:

- 1. Master Planning Permit Application, undated, with Cover Letter, dated January 29, 2021, and Executive Summary, dated January 29, 2021
- 2. Plan Set, dated January 29, 2021:
  - a. Cover Sheet (Sheet A0.0.A)
  - b. Site Plan (Sheet A0.2.A)

- c. Elevations Main House (East and West Elevations) (Sheet A2.0.A)
- d. Elevations Main House (South and North Elevations (Sheet A2.1.A)
- e. Sections Main House (Sheet A3.0.A)
- f. Site Plan (Sheet A0.2.B)
- g. Elevations Detached Garage/Studio (Sheet A2.0.B)
- h. Sections Detached Garage/Studio (Sheet A3.0.B)
- 3. Notice of Application, issued April 12, 2021
- 4. Notice of Public Hearing, with attachment:
  - a. Classified Proof South Whidbey Record, published June 12, 2021
- 5. Civil Drawings:
  - a. Cover Sheet (Sheet C01), dated January 27, 2021
  - b. Notes (Sheet C02), dated January 27, 2021
  - c. Existing Conditions & TESC Plan (Sheet C03), dated January 27, 2021
  - d. Draining and Grading Plan (Sheet C04), dated January 27, 2021
  - e. Details (Sheet C05), dated January 27, 2021
  - f. Details (Sheet C06), dated January 27, 2021
  - g. General Notes (Sheet S1), dated January 29, 2021
- 6. Drainage Report, Davido Consulting Group, dated January 2021
- 7. FEMA FIRM map
- 8. FEMA Floodplain Habitat Assessment, Wetlands & Wildlife, Inc., dated January 29, 2021
- 9. Flood Hazard Storage Calculation Report, Davido Consulting Group, dated January 2021
- 10. Geotechnical Report, Palmer Geotechnical Consultants, Inc., dated January 26, 2021
- 11. Draining and Grading Plan (Sheet C04), dated January 27, 2021, with Annotations
- 12. Critical Areas and Shoreline Report, Wetlands & Wildlife, Inc., dated January 29, 2021
- 13. Arborist Reports, South Whidbey Tree Service, dated November 25, 2019, including:
  - a. Slope Vegetation Assessment
  - b. Assessment of one Big Leaf Maple for Current Health and Risk Post-Construction
- 14. Staff Report

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record hearing:

# **FINDINGS**

# **Application and Notice**

1. Alan Armstrong, Strongwork Architecture, on behalf of Rebecca McLemore (Applicant), requests a Shoreline Substantial Development Permit (SSDP), a Shoreline Conditional Use Permit (SCUP), and a Shoreline Variance (SVAR) to construct a 2,700 square foot, two-story, single-family residence, and an 865 square foot garage with an accessory dwelling unit (ADU) on the upper level, on a 0.54-acre property located within the shoreline jurisdiction. An existing 728 square foot single-family residence and associated carport and shed on the property would be removed as part of the project, and the proposed new single-family residence would be sited in approximately the same building

footprint as the existing residence, with some expansion. An SSDP is necessary because a portion of the project, specifically the proposed ADU, does not fall within any of the exemptions delineated under Washington Administrative Code (WAC) 173-27-040. A SCUP is required because the City Shoreline Master Program (City SMP) does not specifically list an ADU as a permitted or prohibited use. Finally, an SVAR is required to allow the proposed residence and associated garage/ADU to be constructed within the buffer associated with an on-site steep slope. The property is located at 325 Wharf Street. Exhibit 1; Exhibit 2; Exhibit 5; Exhibit 11; Exhibit 14, Staff Report, pages 1, 2, 5, and 17 through 19.

2. The City of Langley (City) determined that the application was complete on April 12, 2021. The same day, the City mailed notice of the application to property owners within 500 feet of the subject property, with a comment deadline of April 26, 2021. On or about June 9, 2021, the City provided notice of the public hearing associated with the application by mailing notice to property owners within 500 feet of the property and by posting notice on-site and at designated City locations. The City published notice of the hearing in the *South Whidbey Record* on June 12, 2021. The City received one comment from a neighboring property owner, Duane Den Adel, who expressed concerns about potential damage from construction vehicles to a driveway easement providing access to the site through his property. The Applicant is working with the neighboring property owner to secure an agreement ensuring that impacts to the driveway from temporary construction activity would be adequately addressed. The Applicant would provide the City with a copy of the agreement prior to issuance of a building permit. *Exhibit 3*; *Exhibit 4*; *Exhibit 14*, *Staff Report*, *pages 2*, *4*, *and 5*.

# State Environmental Policy Act

3. The City determined that the proposal is categorically exempt from environmental review under the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW), in accord with WAC 197-11-800. Specifically, the proposal is exempt from SEPA environmental review because it involves the construction of a detached single-family residence and an accessory structure. WAC 197-11-800(1)(a)(i) and (2)(e). Exhibit 14, Staff Report, page 2; Exhibit 15.

# Comprehensive Plan and Zoning

4. The property is designated "Commercial" under the City Comprehensive Plan. See City Comprehensive Plan, Figure LU-10. The Commercial designation "includes land zoned for retail and wholesale trade, offices, hotels, motels, restaurants, services outlets, and related services," with "denser development of professional offices, retail stores, and mixed residential and commercial uses" occurring in the downtown business district. City Comprehensive Plan – Land Use Element at 8. The property is located within 200

Findings, Conclusions, and Decision City of Langley Hearing Examiner McLemore SSDP, SCUP, and SVAR No. SDP-21-001

Page 3 of 19

<sup>&</sup>lt;sup>1</sup> The property is identified by the Tax Parcel No. S8250-00-00025-0. *Exhibit 14, Staff Report, page 1.* 

feet of the ordinary high water mark of Puget Sound, and is therefore within the shoreline jurisdiction of the State Shoreline Management Act (SMA) and the City SMP. RCW 90.58.030(2)(f); City SMP, Sec. 1.7. The City SMP map identifies the property as being within the "Urban" shoreline environment. City SMP at 21 (Figure 2). City staff, however, in consultation with the Washington State Department of Ecology (DOE), determined that the property does not meet the criteria for an Urban shoreline designation under the City SMP and, therefore, determined that the appropriate designation for the property is "Shoreline Residential." "The purpose of the Shoreline Residential Designation is to accommodate residential development and associated structures that are consistent with the [City SMA] and the protection and restoration of ecological functions. An additional purpose is to provide appropriate public access and recreational uses." City SMP, Sec. 3.3.2.A. Detached single-family residences are permitted outright in the Shoreline Residential environment. City SMP at 45 (Table 1). ADUs, however, are not listed as a permitted or prohibited use in the Shoreline Residential environment and, therefore, constitute an unclassified use that may be authorized with a SCUP. City SMP, Sec. 4.10. Exhibit 14, Staff Report, page 5.

- 5. The property is zoned Central Business (CB). Single-family dwellings are listed as a prohibited use within the CB zone. Langley Municipal Code (LMC) 18.09.010. LMC 18.31.010 provides, however, that regulations under the City SMP take precedence when there is a conflict with the zoning code. As noted above, detached single-family residences are permitted outright in the Shoreline Residential environment, and ADUs are allowed with a SCUP. The property is also within the "Wharf Street Overlay District." The purpose of the Wharf Street overlay is to "establish context-sensitive regulations that are intended to compliment those regulations already in place in the underlying zoning districts." LMC 18.11.010. These context-sensitive regulations focus on mixed use and multi-family developments and do not provide clear guidance for the proposed single-family residential development. Accordingly, the development standards applicable to the underlying CB zone govern the proposal except where the standards conflict with the City SMP. Exhibit 14, Staff Report, page 2.
- 6. Chapter 18.16 LMC provides zoning regulations applicable to the CB zoning district. Specifically, as applicable to the proposal, the CB zoning district regulations provide that: there are no minimum lot size or maximum lot coverage requirements; the maximum building height is 30 feet; and there are no setback requirements for property not abutting a residentially zoned property. The proposed single-family residence would be 29 feet in height, and the proposed accessory garage/ADU would be 24 feet 6 inches in height, in accord with the zoning regulations. Adjacent properties to the north and south are zoned

Findings, Conclusions, and Decision City of Langley Hearing Examiner McLemore SSDP, SCUP, and SVAR No. SDP-21-001

Page 4 of 19

\_

<sup>&</sup>lt;sup>2</sup> WAC 173-26-211(2)(b) provides in relevant part that a local jurisdiction's shoreline master program should "make it clear that in the event of a mapping error, the jurisdiction will rely upon common boundary descriptions and the criteria contained in RCW 90.58.030(2) and chapter 173-22 WAC pertaining to determinations of shorelands, as amended, rather than the incorrect or outdated map."

CB. The property is bordered by Cascade Avenue to the west and by Puget Sound to the east. *Exhibits 1 through 3; Exhibit 5; Exhibit 14, Staff Report, pages 2, 5, and 6.* 

# **Existing Conditions and Critical Areas**

- The 0.54-acre property takes access from a 10-foot-wide driveway access easement that 7. connects to the southern terminus of Wharf Street. As noted above, the Applicant would enter into an agreement with the neighboring property owner to the north to ensure that impacts to the driveway from temporary construction activity would be adequately addressed, which the Applicant would provide to the City prior to issuance of a building permit. The property currently contains an existing single-family residence, carport, and shed/cellar that would be removed as part of the proposed development. The property is currently served by public sewer and water. The proposed development would require that a new six-inch side sewer line be installed to the south, and both the proposed new residence and the accessory garage/ADU structures would require lateral line connections to the new six-inch side sewer line. In addition, the project would be required to install a new water meter on the City right-of-way north of the adjacent property to the north and to install a new water service line. The Applicant would be required to obtain utility easements necessary for these utility improvements prior to issuance of a building permit. Exhibits 1 through 3; Exhibit 5; Exhibit 14, Staff Report, pages 2, 4, and 20.
- The eastern portion of the property is mapped as being within a regulated FEMA Flood 8. Hazard Area, and the entire property is located within a riparian habitat zone that extends 250 feet from the ordinary high water mark of Puget Sound. Chapter 15.24 LMC provides regulations applicable to development within flood hazard areas, including regulations requiring that a habitat assessment demonstrate that the proposed development would not adversely affect Endangered Species Act (ESA)-listed fish and wildlife species or critical habitat and that new residential structures be elevated one foot or more above the Base Flood Elevation (BFE). LMC 15.24.060; LMC 15.24.110. The Applicant's project plans demonstrate that the new single-family residence would be elevated more than two feet above the BFE and that the ADU would be located more than 24 feet above the BFE. Wetlands and Wildlife, Inc., prepared a FEMA Floodplain Habitat Assessment for the Applicant, dated January 29, 2021, to address the project's potential impacts to fish and wildlife habitat within the floodplain. The assessment determined that the project would not result in any adverse ecological impacts to ESAlisted species or critical habitat. The assessment also determined that the project would provide an increase in available floodwater storage, as compared to existing conditions, by elevating the new residential structure above the BFE. Davido Consulting Group prepared a Flood Storage Calculation Report for the Applicant, dated January 2021, which confirms that the proposal would result in a net increase of available floodwater storage of approximately 45.8 cubic yards through the removal of existing structures lacking flood vents and the elevation of new structures above the BFE. Exhibit 2; Exhibit 3; Exhibits 7 through 9; Exhibit 14, Staff Report, pages 6 through 9.

- 9. The Applicant proposes to site the proposed single-family residence and associated garage/ADU at the toe (bottom) of a steep slope bluff, Cascade Bluff. The municipal code and the City SMP contain conflicting provisions regarding development in this location. For example, the context-sensitive regulations for the Wharf Street Overlay District provide that the required setback from Cascade Bluff is the toe of the slope or, where a retaining wall concept is implemented, 20 feet from the toe of the retaining wall, as an exception to the 50-foot steep slope buffer and additional 15-foot building setback generally required under the City's critical areas regulations, specifically LMC 16.20.045. LMC 18.11.040. In contrast, the City SMP adopts by reference the steep slope buffer and setback requirements of LMC 16.20.045. City SMP, Sec. 4.3.2.A.1.f. The City SMP clarifies that any conflict between the development standards of the City SMP and the municipal code shall be resolved in favor of the standard that provides greater protection of shoreline resources. City SMP, Sec. 4.3.2.A.3. Accordingly, the minimum 50-foot buffer and additional 15-foot building setback from the toe of Cascade Bluff required under the City's critical areas ordinance, as adopted in the City SMP, applies to the project proposal. As explained in more detail below, the Applicant seeks an SVAR to allow development within the required bluff buffer. Exhibits 1 through 3; Exhibit 5; Exhibit 10; Exhibit 14, pages 9 through 12.
- 10. The City SMP provides in relevant part that residential structures may be located in geologically hazardous areas only if a geotechnical evaluation has been prepared and deemed acceptable by the Shoreline Administrator. *City SMP*, *Sec.* 6.8.2.6. In accordance with this requirement, Palmer Geotechnical Consultants, Inc., prepared a Geotechnical Report for the Applicant, dated January 26, 2021. The report determined that a proposed retaining wall along the southwest side of the proposed residence and associated garage/ADU would be sufficient to provide protection for the structures and that, therefore, the proposed location of the new structures, on pin pile foundation elements at the toe of Cascade Bluff, would be appropriate. The report provides recommendations for site development and foundation design to which the Applicant would adhere. *Exhibits 1 through 3; Exhibit 5; Exhibit 10; Exhibit 14, pages 9 through 12.*

# Shoreline Substantial Development Permit

11. The State Shoreline Management Act (SMA) and the City SMP govern work within 200 feet of the ordinary high water mark of Puget Sound. *City SMP*, *Sec. 3.1; RCW* 90.58.030(2)(f). Any "substantial development" within the shoreline jurisdiction requires approval of an SSDP. *Substantial development* is any development in which the total cost or fair market value exceeds \$7,047, or any development that materially interferes with the normal public use of the water or shorelines of the state. *RCW* 90.58.030(3)(e). Development of a single-family residence does not normally require an SSDP. *WAC* 173-27-040(2)(g). Under WAC 173-27-040(1)(d), however, an SSDP is required for the entire project because the proposed ADU is not eligible for exemption. *Exhibit 14, Staff Report, page 5.* 

12. The City SMP is intended to carry out the responsibilities imposed by the SMA; guide future development of shoreline in the city in a positive, effective, and equitable manner consistent with the SMA; promote the public health, safety, and general welfare by providing long range, comprehensive policies and effective, reasonable regulations for development and use of the City's shorelines; promote uses and development of the shoreline consistent with the Comprehensive Plan while protecting and restoring environmental resources; and ensure, at minimum, no net loss of shoreline ecological processes and plan for restoring shoreline that have been impaired or degraded. *City SMP, Sec. 1.3.* As noted above, City staff determined the subject property is within the Shoreline Residential environment, which is intended to accommodate residential development and associated structures that are consistent with the City SMA while protecting and restoring shoreline ecological functions. *City SMP, Sec. 3.3.2.A. Exhibit 14, Staff Report, page 5.* 

# Shoreline Vegetation Management

The City SMP contains policies and regulations intended to preserve native shoreline 13. vegetation to ensure no net loss of shoreline ecological functions from shoreline development. City SMP, Secs. 4.3 and 4.8. The Applicant does not propose any development within the 25-foot shoreline buffer associated with Puget Sound. Under the City SMP, however, the Applicant would be required to enhance the shoreline buffer area in an amount equal to the percentage increase in impervious lot coverage that would occur on the property outside of the shoreline setback. City SMP, Sec. 4.3.2.C.6. Wetlands and Wildlife, Inc., prepared a Critical Areas and Shoreline Report for the Applicant, dated January 29, 2021. The report determined that the proposed development would result in a net 7.7 percent increase in impervious lot coverage, requiring 292 square feet of the shoreline buffer to be enhanced. The Applicant proposes to enhance 1,065 square feet of the shoreline buffer by removing invasive vegetation and planting native species. South Whidbey Tree Services provided Arborist Reports for the Applicant, dated November 25, 2019, which identified and recommended removal of a hazardous Big Leaf Maple tree on the property. The Applicant proposes to reduce the height of the tree to approximately 10 to 15 feet so that the remaining standing snags would provide future bird habitat. As mitigation for the loss of ecological functions provided by the tree, the Applicant would plant three replacement trees on the property, northeast of the existing hazard tree. The Applicant's Critical Areas and Shoreline Report determined that the proposed development and vegetation management measures would exceed ecological industry standards and would result in no net loss of shoreline ecological functions. Exhibit 12; Exhibit 13; Exhibit 14, pages 15 through 17.

# Stormwater Management

14. The City SMP requires new residential development proposals to provide a drainage plan demonstrating compliance with the requirements of the 2019 Stormwater Management Manual for Western Washington. *City SMP*, *Sec.* 6.8.2.4; see also *LMC* 15.01.025.B.15.

Davido Consulting Group prepared a Drainage Report for the Applicant, dated January 2021. All stormwater from impervious surfaces would fully infiltrate on-site. Stormwater runoff from roof areas would be tightlined through roof downspouts into three separate DOE-approved downspout infiltration drywell systems. Runoff from the driveway would sheet flow toward the beach in a manner mimicking the existing conditions of the site. The Drainage Report also provides details of the Stormwater Pollution Prevention Plan for the project and notes that the temporary erosion and sediment control measures for the project would comply with the requirements of the 2019 Stormwater Management Manual for Western Washington. *Exhibit* 6.

# Shoreline Stabilization

15. The City SMP contains policies and regulations encouraging new development activities to be located and designed to prevent or minimize the need for shoreline stabilization measures. *City SMP*, *Sec. 5.1*. A low-profile wooden bulkhead overgrown with vegetation currently runs roughly along the edge of the shoreline buffer. The Applicant's geotechnical engineer determined that additional shoreline stabilization measures would not be necessary for the proposal because the existing condition of the shoreline is a depositional environment, the prevailing winds are from the northwest, the marina breakwater provides protection, and the existing natural shoreline of logs built up with native grasses has established a preferred soft shore condition. *Exhibit 14*, *Staff Report*, *pages 12 and 13*.

# Shoreline Conditional Use Permit

- 16. As noted above, a SCUP is required for the project because it includes an ADU, which is an unclassified use in the Shoreline Residential environment. *City SMP at 45 (Table 1); City SMP, Sec. 4.10.* The purpose of a SCUP is to provide greater flexibility in varying the application of the use regulations of the City SMP, particularly where denial of the application would thwart the policies of the SMA. *City SMP, Sec. 7.6.5.1.* The criteria for approval of a SCUP are provided in City SMP, Section 7.6.5.3. City staff reviewed the application and determined that it would satisfy these criteria, noting:
  - The proposed development is for a new single-family dwelling and detached garage with an ADU. The single-family dwelling is permitted in the Shoreline Residential environment, and the garage is allowed as an appurtenance to the single-family dwelling. ADUs, however, are an unclassified use allowed only with approval of a SCUP.
  - RCW 90.58.020 provides, "Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single-family residences and their appurtenant structures."
  - The size of the proposed single-family dwelling is generally consistent with the size of the single-family residence located further north on Sunrise Lane.
  - The proposal would not affect the public use and interest. The lot is at the end of a private drive, and there is no public access to the property.

- As detailed in the technical reports submitted with the application, the proposed use would not cause significant adverse impacts to the shoreline environment.
- The subject property is one of a few remaining underdeveloped low bluff properties. The existing cottage is nearly uninhabitable and cannot be remodeled due to its state of disrepair. The proposed new dwelling unit would generally be sited within the existing cottage footprint, with some minor expansion. The footprint of the garage structure is 400 square feet. The garage portion of the structure does not require a SCUP, only the proposed ADU above the garage.

Exhibit 14, Staff Report, pages 18 and 19.

# Shoreline Variance

- 17. As noted above, an SVAR is required for the project due to the proposed location of the new structures within the buffer and building setback area associated with the steep slope of Cascade Bluff. The purpose of a shoreline variance is to provide relief from specific bulk or dimensional requirements of the City SMP when there are extraordinary or unique circumstances relating to the property such that strict implementation of the City SMP would impose unnecessary hardships on the Applicant or would thwart the policies of the City SMP or the SMA. *City SMP*, *Sec.* 7.6.4.1. The criteria for approval of a shoreline variance are provided in City SMP, Section 7.6.4.3. City staff reviewed the application and determined that the project would meet these criteria, noting:
  - The developable area of the property is less than 200 square feet due to the steep slope and related buffers on the west side of the property, as well as the shoreline and its buffer on the east side of the property. The hardship is created by the constraints of the topography and the shoreline.
  - The proposed dwelling unit would be in the same location as the existing dwelling unit but with a 620 square foot larger footprint. The proposed dwelling unit would follow the same frontage place as the existing dwelling, but the stairs for the proposed dwelling would extend further waterward.
  - The proposed garage/ADU could be moved further east to provide less encroachment into the slope, but this would result in the garage/ADU and driveway being located closer to the shoreline buffer, which could negatively impact the buffer and cause unsafe access conditions by eliminating vehicular turnaround space. Under this alternative, vehicles would have to back out of the property, as well as the adjacent property to the north, and then turn around on the Wharf Street right-of-way and marina parking lot.
  - The design of the proposed single-family dwelling and accessory building is compatible with many of the single-family residences located further north on Sunrise Lane. The Wharf Street overlay envisions a multi-family development in this general location.
  - As detailed in the technical reports submitted with the application, the proposal would not cause adverse effects to the shoreline environment. The addition of retaining walls at the rear elevations with additional catchment height would

- provide improved slope stability and would protect the development. The retaining walls would be installed with drainage systems. The native soils of the bluff would not be excavated.
- The proposal would not affect the public use and public interest. The lot is at the end of a private drive, and there is no public access to the property.

Exhibit 14, Staff Report, pages 17 and 18.

# **Testimony**

- City Director of Community Planning Brigid Reynolds testified generally about the 18. application and how, with conditions, it would satisfy the criteria for approval of an SSDP, a SCUP, and an SVAR. She noted that the project would include the removal of an existing 728 square foot cottage and the construction of a 2,700 square foot, two-story, single-family residence and an 865 square foot garage that would have an ADU on the second floor. Ms. Reynolds stated that the property is accessed via a driveway easement through a neighboring property to the north, which connects to the southern terminus of Wharf Street. She explained that the developable area of the property is limited due to the location of a bluff and associated steep slope buffer area on the western portion of the site and a shoreline buffer associated with Puget Sound on the eastern portion of the site. Ms. Reynolds stated that the Applicant requests a shoreline variance to allow the proposed residence and garage/ADU to be located entirely within the steep slope buffer associated with the bluff. She explained that the Applicant's geotechnical assessment determined that the site is suitable for the proposed development. Ms. Reynolds stated that the proposed residence and associated garage/ADU would be elevated in accord with FEMA floodplain requirements and that the proposal would result in improved floodwater storage capabilities and improved shoreline buffer ecological functions. She explained that the proposal would be required to comply with the 2019 Stormwater Management Manual for Western Washington. Testimony of Ms. Reynolds.
- 19. Applicant Rebecca McLemore testified that she purchased the property approximately two years ago and that she appreciates City staff's assistance in guiding her through the process. *Testimony of Ms. McLemore*.
- 20. Applicant Representative Alan Armstrong testified that, in addition to meeting requirements under the City SMP, the proposed development would meet all other requirements under the municipal code. He stressed that the project has been designed to minimize disturbance to the site. *Testimony of Mr. Armstrong*.
- 21. Civil Engineer Danny Ochoa of Davido Consulting Group testified about how the project would manage stormwater in compliance with the requirements of the 2019 Stormwater Manual for Western Washington. He explained that stormwater runoff from roof areas and non-pollution generating surfaces would be collected and directed to DOE-approved dry wells before being infiltrated on-site and that runoff from the driveway would sheet

- flow toward the beach in manner mimicking the existing conditions of the site. *Testimony of Mr. Ochoa*.
- 22. Scott Spooner of Wetlands and Wildlife, Inc., testified that all components of the project would be located outside of the 25-foot shoreline setback from the ordinary high water mark of Puget Sound. He noted that invasive vegetation would be removed from the shoreline setback and replaced with native species in accord with City SMP requirements. Mr. Spooner also noted that a hazardous Big Leaf Maple tree would be cut to a height that would alleviate the tree's hazardous conditions while maintaining some level of ecological functions. He explained that the Applicant proposes to plant three replacement trees as mitigation for the loss of some ecological functions provided by the Big Leaf Maple. *Testimony of Mr. Spooner*.
- 23. Charles Pancerzewski testified that he has concerns about the parking and traffic impacts of the proposal in light of the proposed ADU. He noted that the ADU could generate greater traffic impacts and require additional on-site parking space if it were to be utilized as a rental unit. *Testimony of Mr. Pancerzewski*.
- 24. Duane Den Adel testified that he owns property immediately to the north of the site and has concerns about the temporary impacts from construction vehicles utilizing the driveway easement through his property to access the site. He also expressed concerns about potential traffic impacts from visitors using the easement to access the site, particularly if the ADU were to be utilized as a rental unit. Mr. Den Adel stated that he has been working on an agreement with the Applicant to address the temporary construction impacts and would like to have a written surety bond in place to ensure that any damage to the driveway would be repaired. He noted that he does not have any other issues with the proposed development. *Testimony of Mr. Den Adel*.
- 25. Ms. McLemore testified in response to Mr. Pancerzewski's and Mr. Den Adel's concerns, noting that the ADU would be used to accommodate visiting family members and that she does not have any current plans to use the ADU as a rental unit. Ms. McLemore also noted that there would be sufficient space on the property to accommodate visitor parking. She stated she will continue to discuss issues related to the easement with Mr. Del Adel to assure him that the driveway access easement will be in as good or better condition following construction. *Testimony of Ms. McLemore*.
- 26. Ms. Reynolds explained that the municipal code requires two parking stalls for a single-family residence and that the code does not regulate who occupies an ADU. She noted, however, that if a property owner wants to convert an ADU to a short-term rental unit, the property owner must go through an application process and must meet certain standards to have the application approved. *Testimony of Ms. Reynolds*.

# Staff Recommendation

27. Ms. Reynolds testified that City staff determined that, with conditions, the proposed project would be consistent with the City SMP and the specific criteria for approval of an SSDP, a SCUP, and a shoreline variance and recommends approval of the request. The Applicant testified that she would adhere to the conditions of approval. *Exhibit 14*, *Staff Report, page 20; Testimony of Ms. Reynolds; Testimony of Ms. McLemore*.

# **CONCLUSIONS**

# Jurisdiction

The Hearing Examiner is authorized to hear and decide requests for Shoreline Substantial Development Permit, Shoreline Conditional Use Permits, and Shoreline Variances. *Langley Municipal Code (LMC)* 18.37.070.A.5.

# Criteria for Review

Shoreline Management Act

The Shoreline Management Act is codified at RCW 90.58.020. Applicable policies of RCW 90.58.020 include those to foster "all reasonable and appropriate uses"; protect against adverse effects to the public health, the land, and vegetation and wildlife; and give priority to single-family residences and appurtenant structures in authorizing alternations to the natural condition of the shoreline. Nonetheless, "private property rights are 'secondary to the SMA's primary purpose, which is to protect the state shorelines as fully as possible." *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009) (internal quotation marks omitted) (quoting *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 336-37, 969 P.2d 1072 (1998)). Permitted shoreline uses must be designed to "minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water." *RCW 90.58.020. See also Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994).

In promulgating the Shoreline Management Act of 1971, the legislature recognized that "ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development" of the state's shorelines. *RCW* 90.58.020. The legislature also determined that "unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest." *RCW* 90.58.020. Accordingly, the Shoreline Management Act requires local governments to develop a master program to regulate shoreline uses consistent with its guidelines. *RCW* 90.58.080(1).

# Shoreline Management Act Regulations

The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 of the Washington Administrative Code (WAC). Chapter 173-26 WAC sets forth procedures and guidelines for local adoption of shoreline master programs that are not applicable to the Applicant's permit request. Chapter 173-27 WAC sets forth permitting procedures and permit criteria. The Hearing Examiner reviews the application under the following criteria:

- (1) A substantial development permit shall be granted only when the development proposed is consistent with:
  - (a) The policies and procedures of the act:
  - (b) The provisions of this regulation; and
  - (c) The applicable master program adopted or approved for the area. Provided, that where no master program has been approved for an area, the development shall be reviewed for consistency with the provisions of chapter 173-26 WAC, and to the extent feasible, any draft or approved master program which can be reasonably ascertained as representing the policy of the local government.
- (2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and the local master program.

WAC 173-27-150.

Thus, the Hearing Examiner must review the relevant City of Langley shoreline master program (City SMP) goals and policies.

# Langley Shoreline Master Program

The City SMP is intended to:

- 1. Guide the future development of shorelines in the city of Langley in a positive, effective, and equitable manner consistent with the Shoreline Management Act;
- 2. Promote the public health, safety, and general welfare of the community by providing long range, comprehensive policies and effective, reasonable regulations for development use of Langley's shorelines;
- 3. Promote uses and development of the of Langley shoreline consistent with the Langley Comprehensive Plan while protecting and restoring environmental resources; and
- 4. Ensure, at minimum, no net loss of shoreline ecological functions and processes and to plan for restoring shorelines that have been impaired or degraded by adopting and fostering the Shoreline Management Act policy described in RCW 90.58.020.

City SMP, Sec. 1.3.

The City SMP designates five shoreline environments that are consistent with, and implement, the SMA and SMA guidelines and the City's Comprehensive Plan. These environmental designations have been assigned consistent with the corresponding criteria provided for each environment. In delineating environment designations, the City aims to ensure that existing shoreline ecological functions are protected with the proposed pattern and intensity of development. Such designations are also intended to be consistent with policies for restoration of degraded shorelines. The three shoreline environments and three aquatic subareas are: (1)

Shoreline Residential, (2) Urban, and (3) Aquatic Subareas: (a) Aquatic Conservancy, (b) Aquatic–Urban, and (c) Aquatic–Boat Harbor. *City SMP*, *Sec. 3.3*.

The City SMP establishes shoreline goals for economic development; shoreline use; public access; recreation; circulation; conservation; restoration; archeological, historical, and cultural preservation; and flood hazard management. See City SMP (2013), Sec.2.2, pages 8 to 13. The City SMP also contains shoreline policies and regulations related to shoreline vegetation management, stormwater management, and shoreline stabilization, which are addressed in the above findings. Findings 11-15.

# Shoreline Conditional Use Permit

The City SMP requires that conditional use permits shall be authorized only when they are consistent with all of the following criteria:

- 1. The proposed use is consistent with the policies of RCW 90.58.020, WAC 173-27-160, and all provisions of the City SMP.
- 2. The use would not interfere with public use of public shorelines.
- 3. The use and design of the project would be compatible with other authorized uses in the area and with uses planned for the area under the Comprehensive Plan and the City SMP.
- 4. The proposal would not cause significant adverse effects on the shoreline environment in which it is located.
- 5. The public interest would suffer no substantial detrimental effect.

City SMP, Sec. 7.6.5.3.

In addition, consideration must be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses must remain consistent with the policies of RCW 90.58.020 and must not produce substantial adverse impacts to the shoreline environment. *City SMP*, *Sec.* 7.6.5.4. The Hearing Examiner has authority to impose conditions and standards to ensure that a proposed shoreline conditional use would satisfy these criteria. *City SMP*, *Sec.* 7.6.5.6.

# Shoreline Variance

The City SMP requires that shoreline variances shall be authorized only when the Applicant can demonstrate all of the following:

- 1. That the strict application of the bulk, dimensional, or performance standards set forth in the City SMP precludes, or significantly interferes with, reasonable use of the property;
- 2. That the hardship is specifically related to the property and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the City SMP, and not, for example, from deed restrictions or the Applicant's own actions;

- 3. That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the City's Comprehensive Plan and the City SMP and will not cause adverse impacts to the shoreline environment;
- 4. That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area;
- 5. That the variance requested is the minimum necessary to afford relief; and
- 6. That the public interest will suffer no substantial detrimental effect.

City SMP, Sec. 7.6.4.3

In addition, consideration must be given to the cumulative impact of additional requests for like actions in the area. For example, if variances were granted for other developments in the area where similar circumstances exist, the total of the variances must remain consistent with the policies of RCW 90.58.020 and must not produce substantial adverse impacts to the shoreline environment. *City SMP*, *Sec.* 7.6.4.5.

The criteria for review adopted by the Langley City Council are designed to comply with the requirement of Chapter 36.70B RCW to implement the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed developments to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW* 36.70B.040.

# **Conclusions Based on Findings**

Shoreline Substantial Development Permit

1. With conditions, the proposal would be consistent with the policies of the Shoreline Management Act. Applicable policies of the Shoreline Management Act (SMA) include those to foster "all reasonable and appropriate uses;" protect against adverse effects to the public health, the land, and vegetation and wildlife; and give priority to single-family residences and appurtenant structures in authorizing alterations to the natural condition of the shoreline. Permitted shoreline uses must be designed to "minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water." *RCW 90.58.020*.

The proposal is to construct a 2,700 square foot, two-story, single-family residence and an 865 square foot garage with an accessory dwelling unit on the upper level on a 0.54-acre lot within the Shoreline Residential environment. The proposed new single-family residence and accessory structure would replace an existing 728 square foot single-family residence on the property, which is uninhabitable in its current degraded condition and is incapable of being remodeled. The new residence would be constructed in roughly the same building footprint as the existing residence but would have a 620 square foot larger footprint. The City provided reasonable notice and opportunity to comment on the proposal. The City received one comment from a neighboring property owner to the north, which raised concerns about potential damage from construction vehicles to a driveway easement providing access to the site through his property. The Applicant and

the neighboring property owner are working on an agreement to address these concerns, which the Applicant would provide to the City prior to issuance of a building permit. In addition, a member of the public testified at the hearing that he has concerns about the parking and traffic impacts of the project in light of the proposed ADU, which he noted could generate additional traffic and parking demands if utilized as a rental unit. In addition to the two-car garage that would be developed on the property, the site would contain additional space sufficient for visitors to park their vehicles. As explained by City Director of Community Planning Brigid Reynolds, the City does not regulate who occupies an ADU and has additional requirements for conversion of an ADU to short term rental unit. Any additional traffic impacts from an ADU on the property would be minimal.

The proposal to construct a new single-family residence and accessory garage/ADU structure to replace an existing, degraded single-family residence on the property is a reasonable and appropriate use within the Shoreline Residential environment and, as conditioned, would result in no net loss of shoreline ecological function or value. The proposal would not infringe on the public's right to use and enjoy Puget Sound because the subject property is located at the end of a private drive, with no public access to the site.

Conditions, as detailed below, are necessary to ensure that the Applicant: submits and obtains approval of a utility plan for water and sewer prior to building permit issuance; prepares a utility easement for both sewer and water prior to building permit issuance; submits a right-of-way permit application for utility work within the City right-of-way prior to issuance of a grading permit; provides the City with a copy of the construction impact agreement with the neighboring property owner prior to building permit issuance; follows the recommendations and mitigation requirements detailed in the technical reports submitted with the application; and enters into an agreement that runs with the land and holds the City harmless against any claims that would result from the development. Findings 1, 2, 4 – 27.

**2. With conditions, the proposal would be consistent with applicable shoreline regulations.** The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 of the Washington Administrative Code (WAC). Chapter 173-26 WAC sets forth procedures and guidelines for local adoption of shoreline master programs that are not applicable to the Applicant's permit request. Chapter 173-27 WAC sets forth permitting procedures and permit criteria. This proposal is being reviewed under the criteria set forth in WAC 173-27-150. These criteria are intended to implement the policies of the SMA, which requires that all shoreline projects be consistent with an approved local Shoreline Master Program. With the conditions noted above in Conclusion 1, the proposal would be consistent with the City SMP, as described in more detail below. *Findings 1* – 27.

3. With conditions, the proposal would be consistent with the City of Langley Shoreline Master Program (City SMP) and applicable shoreline regulations. The proposed development of a single-family residence and associated garage is an allowed use in the Shoreline Residential environment, and the proposed ADU is allowed with a shoreline conditional use permit (SCUP). As discussed in more detail below, the Applicant's request for a SCUP to allow the ADU satisfies the applicable SCUP criteria. The City determined that the proposal is categorically exempt from SEPA environmental review, in accord with WAC 197-11-800 because it involves the construction of a detached single-family residence and an accessory structure. The proposal would comply with the CB zoning district standards for minimum lot size, maximum lot coverage, maximum building height, and minimum setbacks. The Applicant does not propose any development within the 25-foot shoreline setback from the ordinary high water mark of Puget Sound, and the proposal would comply with City SMP development standards for shoreline vegetation management, stormwater management, and shoreline stabilization. The technical reports submitted with the application demonstrate that the project would result in no net loss of shoreline ecological functions. As noted in Conclusion 1, conditions are necessary to ensure the proposal fully complies with the City SMP and meets all requirements for an SSDP. Findings 1-27.

# Shoreline Conditional Use Permit.

4. With conditions, the proposal would satisfy the criteria for a Shoreline Conditional Use Permit under the City of Langley Shoreline Master Program. The proposed ADU is a reasonable and appropriate use in the Shoreline Residential environment. Although the City SMP does not specifically address ADUs, it provides that unclassified uses may be allowed in the shoreline jurisdiction with a SCUP. Here, the proposed ADU would be located above the proposed garage, which is allowed in the Shoreline Residential environment as an appurtenance to the proposed single-family dwelling. The proposed ADU would be on a lot at the end of a private drive and, therefore, would not interfere with the public use of the public shorelines. The proposed ADU would be compatible with other residential development in the vicinity, particularly when considering the multi-family development standards and design guidelines generally applicable to residential property within the Wharf Street Overlay District. As discussed in the above conclusions and detailed in the Applicant's technical reports, the proposal would result in no net loss of shoreline ecological functions. The proposal is exempt from SEPA environmental review. Concerns raised by members of the public regarding the proposal's potential access easement, traffic, and parking impacts have been adequately addressed by the Applicant, and the Hearing Examiner concludes that the public interest would suffer no substantial detrimental effect from the proposed ADU use. There are no additional requests for similar actions in the area. The subject property is one of only a few remaining underdeveloped low bluff properties in the area. Conditions, as detailed below, are necessary to ensure that the proposal complies with the City SMP and meets all requirements for a SCUP. Findings 1, 16-27.

## Shoreline Variance

5. With conditions, the proposal would satisfy the criteria for a Shoreline Variance under the City of Langley Shoreline Master Program. The Applicant requests a shoreline variance to allow the proposed new single-family dwelling and associated garage/ADU to be located within the buffer and building setback area associated with the steep slope of Cascade Bluff. The variance is necessary because of unique conditions of the property that were not the result of any actions by the Applicant. Specifically, the western portion of the property contains the steep slope area of Cascade Bluff and associated 50-foot buffer and the eastern portion of the property contains the Puget Sound shoreline and associated 25-foot shoreline buffer. Strict application of the buffer requirements of the City SMP would result in a developable area of the property amounting to less than 200 square feet and would therefore preclude the property owner from reasonable and appropriate residential use of the property. The Applicant provided a geotechnical report with the application, which determined that a proposed retaining wall along the southwest side of the proposed residence and associated garage/ADU would be sufficient to provide protection for the structures and that, therefore, the proposed location of the new structures at the toe of Cascade Bluff would be feasible from a geotechnical perspective. The Applicant would be required to adhere to the recommendations provided in the geotechnical report, including recommendations related to site development and foundation design. The variance would allow the Applicant to develop the property with a new single-family residence compatible with other singlefamily residences in the vicinity and would not constitute a grant of special privilege not enjoyed by other properties in the area. The project is exempt from SEPA environmental review. The City provided reasonable notice and opportunity to comment on the requested variance and did not receive any comments raising concerns with the proposed variance. Findings 1, 7-27.

# **DECISION**

Based on the preceding findings and conclusions, the request for a Shoreline Substantial Development Permit, a Shoreline Conditional Use Permit, and a Shoreline Variance to construct a 2,700 square foot, two-story, single-family residence; an 865 square foot garage, with an accessory dwelling unit on the upper level; and associated site improvements on a 0.54-acre property located at 325 Wharf Street is **APPROVED**, with the following conditions:<sup>3</sup>

- 1. A final utility plan for water and sewer must be provided and approved prior to the issuance of a building permit.
- 2. The Applicant shall prepare a utility easement for both sewer and water for review prior to issuance of a building permit.

<sup>&</sup>lt;sup>3</sup> A Shoreline Conditional Use Permit and Shoreline Variance is approved only if the Washington State Department of Ecology approves the requests following it review, as required by the Shoreline Management Act. *See RCW 90.58.140*; *City SMP*, *Sec. 7.7*.

- 3. The Applicant shall submit a right-of-way permit application for utility work in the City's right-of-way prior to issuance of a grading permit.
- 4. The Applicant shall provide the City with a copy of the construction impact agreement between the proponent and the neighboring property owner to the north prior to issuance of a building permit.
- 5. The Applicant shall undertake development of the site consistent with the recommendations and mitigation requirements detailed in the technical reports prepared for this application.
- 6. The Applicant shall enter into an agreement that runs with the land and indemnifies and holds the City harmless against any claims that could result due to this development.

Decided this 6<sup>th</sup> day of July 2021.

ANDREW M. REEVES

Hearing Examiner Sound Law Center