



BRICKLIN & NEWMAN LLP
lawyers working for the environment

Reply to: Seattle Office

July 17, 2019

VIA E-MAIL ONLY TO:
evan.maxim@mercergov.org

Evan Maxim, Director
City of Mercer Island – Community Planning and Development
9611 SE 36th Street
Mercer Island, WA 98040

RE: Crown Castle's Application for Small Cell Node MIV19

Dear Director Maxim:

I submit the following comments regarding Crown Castle's Application for Small Cell Node MIV19, on behalf of Kevin Chester and Neighbors Against Pole Pollution, a group of local Mercer Island residents who live in the area immediately adjacent the proposed node location.

Crown Castle has submitted forty-six applications for small cell wireless facilities on Mercer Island, forty-two of which are proposed to be located on existing utility poles, and two of which are proposed to be located on new steel lighted towers, all within the public right-of-way. Application MIV19, proposed to be located at 4558 46th Street SE near Ellis Pond, is one of the two new cell facilities that would be placed on a new tower.

We understand that these applications are governed by and regulated under the Mercer Island City Code ("MICC"). As described below, the MICC provides you with broad authority to deny, or impose conditions on the approval of, the pending applications. My clients are deeply concerned about the impacts, including environmental and aesthetic impacts, of the proposed MIV19 cell facility and associated tower, and about Crown Castle's failure to comply with the standards and requirements set out in sections 19.06.075, 19.07.030, and 19.21.190 of the Mercer Island City Code.

1. MICC 19.06.075 Small cell deployments – Design and concealment standards

MICC 19.06.075.F provides that new small cell towers within a right-of-way are only permitted if the applicant can establish that the "proposed small cell facility cannot be located on an existing utility pole or light pole, electrical transmission tower or on a site outside of the public rights-of-way such as a public park, public property, building, transmission tower or in or on a nonresidential use in a residential zone whether by roof or panel-mount or separate structure." While Crown Castle's MIV19 application narrative does discuss 19.06.075.F at page 4, the narrative and other documents submitted with Crown Castle's application do not even attempt to establish that the proposed facility cannot be located on a building, such a residential roof with the consent of the owner. The application does not say why or establish that the new tower cannot be

located on other nearby public property. Nor does the application explain why or establish that an existing utility pole located approximately 250 feet away is not “near the proposed location.” It is the applicant’s burden to establish compliance with MICC 19.06.075.F, a burden that Crown Castle has failed to carry.

Unless and until Crown Castle meets its burden of establishing that the “proposed small cell facility cannot be located on an existing utility pole or light pole, electrical transmission tower or on a site outside of the public rights-of-way such as a public park, public property, building, transmission tower or in or on a nonresidential use in a residential zone whether by roof or panel-mount or separate structure,” the City should deny the application and require the applicant to meet the requirements of MICC 19.06.075.F.

2. MICC 19.07.030 Allowed alterations and reasonable use exception

MICC 19.07.030(A)(7)(b-c) provide that utilities (including small cell facilities) must be designed and located to mitigate impacts to critical areas to the greatest extent reasonably feasible, so that there is no net loss in critical area functions. Similarly, MICC 19.06.075.F.d provides that “[n]o new poles shall be located in a critical areas or associated buffer required by the city’s critical areas ordinance, except when determined to be exempt pursuant to said ordinance.”

Our understanding is that Ellis Pond, a short distance westerly of the proposed location, is itself a critical area and the limit of the Ellis Pond critical area may extend beyond the shore of the pond in the form of adjacent wetlands. Yet, we have not seen any evidence that Crown Castle prepared or submitted a wetland delineation report showing the extent of potentially impacted critical areas. Indeed, it appears that Crown Castle ignored the presence of wetlands entirely — in its SEPA checklist at B.3.a (surface water), Crown Castle only mentions Ellis Pond, even though the checklist form requires the applicant to identify “any surface water” including “wetlands.”

Without preparing a wetlands delineation, it is impossible for the applicant to assess and mitigate impacts to critical areas, or to ensure that the proposed tower is not located within the buffer of a wetland. Nor can the city ensure compliance with these rules without knowing where impacted critical areas are located, where they begin, and where they end. For this reason, the City should deny the application and require the applicant to delineate all wetland and other critical areas in the vicinity of its proposed new tower, so that both the applicant and the City can properly assess and mitigate impacts to critical areas pursuant to MICC 19.07.030.A.7.b-c. *See, e.g.*, MICC 19.07.030.A.7.e (providing that the city may require a critical area study for new utilities, including small cell facilities).

Alternatively, the delineation could show that any wetlands adjacent to Ellis Pond are farther away from the proposed tower location. In that case, there would be more room to move the tower off the public right-of-way and onto other public property surrounding the pond, in accordance with MICC 19.06.075.F (prohibiting installation on right-of-way if new tower may be placed on other public property). Either way, the parcel containing Ellis Pond should be assessed for the presence

of wetlands and those wetlands should be fully delineated. Depending on the result of that analysis, the proposed location may violate the code by being too close to the wetlands, or there may be more room to move the tower off the public right-of-way.

3. MICC 19.21.190 Authority to condition or deny proposals (substantive authority)

MICC 19.21.190 implements the authority available to local jurisdictions under Washington's State Environmental Policy Act ("SEPA"), Chapter 43.21C RCW. It provides broad authority to the City to deny, or impose conditions on the approval of, the pending applications based on environmental considerations including noise and other aesthetic impacts.

As to noise impacts, the applicant states in its SEPA checklist that the "[s]peed and frequency of fan-based cooling equipment can be controlled if the noise exceeds allowed levels." But Crown Castle does not identify or discuss the allowed levels of noise, or provide any explanation of how it will monitor noise levels from its proposed facility or control its fan-based cooling equipment to meet allowable noise levels. It should not be the job of neighboring residential property owners and users of public natural areas to invest in noise monitoring equipment and ensure that Crown Castle is complying with the MICC limits on noise. Instead, Crown Castle should be required to make that showing before the permit is approved.

The MICC provides support for the City to impose noise abatement conditions on any approval of Crown Castle's applications in order to meet the requirements of the MICC, or deny the applications if noise abatement measures are not feasible. Pursuant to MICC 19.06.075.A.2, "No equipment shall be operated so as to produce noise in violation of Chapter 8.24 MICC." MICC 8.24.020.Q, in turn, regulates sounds "related to activity authorized by a permit from the city of Mercer Island" and includes day and time restrictions on all such noise. Those day and time restrictions include: (a) "[s]ounds shall only be allowed between the hours of 7 am to 7 pm on Mondays through Fridays, and between the hours of 9 am and 6 pm on Saturdays[,] and (b) "[s]ounds shall be prohibited at any time of day on Sunday and legal holidays." The City should require Crown Castle to incorporate noise abatement measures sufficient to ensure compliance with the restrictions in MICC 8.24.020.Q, or deny the application if noise abatement measures are not adopted.

MICC 8.24.020(R) declares as a public nuisance any "unreasonably loud, disturbing, continuous, irritating, or unnecessary noise, whether emanating from a human, animal or mechanical source." My clients are deeply concerned that the proposed new Small Cell Node MIV19 will produce a disturbing, continuous, irritating noise from a mechanical source, interfering with its members' use and enjoyment of their property and nearby natural areas. The City should require Crown Castle to incorporate noise abatement measures to ensure that the noise from its facility does not constitute a public nuisance under MICC 8.24.020(R), or deny the application if noise abatement measures are not adopted.

Evan Maxim, Director
City of Mercer Island – Community Planning and Development
July 17, 2019
Page 4

Finally, the proposed small cell facility and support tower will have significant adverse visual impacts on the aesthetics of the surrounding neighborhood. The city should also use its SEPA substantive authority to require Crown Castle to move the proposed tower to a different location — either to the west, closer to Ellis Pond; to the north, closer to the terminus of 91st Avenue SE near the Hollerbach Open Space; or to another utility pole approximately 250 feet to the south-west.

4. MICC 19.06.070.D—Underground Utility Areas

Finally, MICC 19.06.070.D provides that “[a] service provider or infrastructure company desiring to locate any aboveground infrastructure in an underground utility area shall provide a separate, standalone pole.” In this case, the area in which Crown Castle plans to place its new tower is an “underground utility area” within the meaning of the city code. Yet, it is unclear if the tower will receive power via over-head utility lines, which would dramatically increase its the visual and aesthetic impact on the surrounding neighborhood.

Consistent with MICC 19.06.070.D, the city should condition any approval of the new tower on a requirement that any associated power or utility lines be placed underground, so as to create a truly “separate” structure within the meaning of the city code. Doing so is necessary to preserve the aesthetic character of the neighborhood, and is in keeping with the plain language and spirit of MICC 19.06.070.D.

Thank you for your attention to these concerns and comments. If you have any questions about this letter, please do not hesitate to call us at the number above, or contact us by e-mail at telegin@bnd-law.com and griefen@bnd-law.com.

Very truly yours,

BRICKLIN & NEWMAN, LLP



Bryan Telegin
Zak Griefen

cc: Client

Bio Park, Interim City Attorney
City of Mercer Island
bio.park@mercergov.org